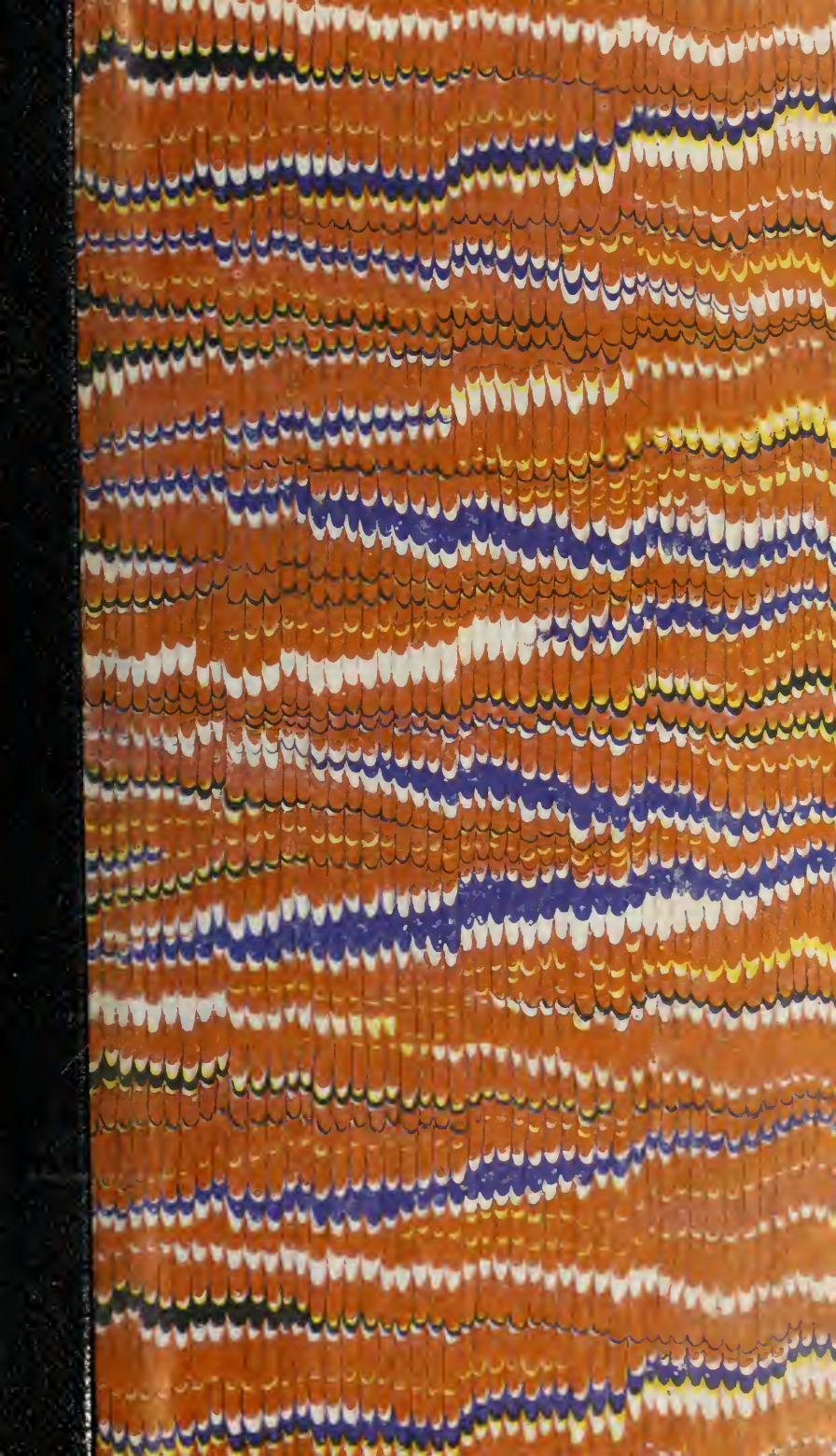

THOUGHTS

ON THE

DISQUALIFICATION

OF THE

ELDEST SONS

OF THE

PEERS OF SCOTLAND,

TO ELECT, OR TO BE ELECTED FROM THAT COUNTRY TO PARLIAMENT.

WITH AN

APPENDIX.

BY

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ADVOCATE AND F. S. S. A.

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1788.

TO

THE MOST NOBLE

WILLIAM HENRY CAVENDISH,

DUKE OF PORTLAND,

&c. &c. &c.

WHOSE POLITICAL PRINCIPLES

AND

PUBLIC CONDUCT

MARK THE PATRIOT AND CITIZEN,

THE FOLLOWING TREATISE

IS

MOST RESPECTFULLY INSCRIBED.

THOUGHTS, &c.

" The Commons conſiſt of all ſuch men, of any property in the " kingdom, as have not ſeats in the Houſe of Lords, every one of which " has a voice in Parliament, either perſonally or by his repreſentatives."

BLACKSTONE'S COMMENT. *on the Law of England.*

IT is the glory of the Britiſh conſtitution, that it is founded not on force or fear, but on juſtice, or a regard to the rights and happineſs of mankind. It profeſſes to ſecure the property and the privileges of every man; to enforce claims, and to redreſs injuries. This ſpirit of equity diffuſes a benign radiance around the majeſty of government, and eſtabliſhes the thrones of kings on the firmeſt foundations. Deſpotiſm, which aims, not to ſe-

A cure,

cure, but to command and ſeize private property, produces in the ſovereign, inconſiſtency and capricioufneſs; in the ſubject, diſtruſt and *dis*-affection. It debaſes and enervates the mind, deſtroys good faith and every virtue, and, by means of oppreſſion on the one hand, and a deſire of change on the other, prepares the way for the moſt dangerous and fatal revolutions. Mild and free governments, on the contrary, ſecure poſſeſſions and honours, ſtimulate exertion, nouriſh hope, and attach the human heart to the authority of guardian and equal laws, with a kind of filial confidence and affection.

Forms of government are not exempted from that change and revolution to which Fate has deſtined every thing that is human. But that their duration may be prolonged to the lateſt poſſible period, it is proper, on every occaſion of deviation, to reduce

reduce them, as nearly as they can be reduced by political wiſdom, to their firſt principles. This, in governments that depend on fear, and a ſuperſtitious reverence for antient cuſtoms and names, may not always be an eaſy taſk; ſince the darkneſs in which both theſe paſſions conſiſt is gradually diſpelled by the progreſſive light of knowledge. But, in the Britiſh conſtitution, there is a perpetual ſpring of ſelf-recovery and reformation; reaſon and juſtice being immutable and eternal. The Britiſh legiſlature, by cutting off the excreſcences of injuſtice and oppreſſion, whether to the community or particular ſets of men, and whether introduced unawares by cuſtom, or ſolemnized by poſitive inſtitution, has, at different times, infuſed new vigour into our civil conſtitution. By authority thus exerciſed, legiſlators promote a reſpect for juſtice, ſecure liberty to every claſs and

condition of men, and conſult the public good in the very higheſt degree to which patriotic virtue can reach: ſince it is univerſally allowed, that the greateſt benefit which men can beſtow on men, is, the eſtabliſhment of ſuch equal and wiſe laws as ſhall be a conſtant ſource of private happineſs, and public proſperity.

Let it not be imagined that the refuſal of juſtice to one order of men, is, to thoſe who are in the full enjoyment of all their rights, a matter of indifference. Example has a wonderful power of multiplication. Depart from the ſpirit of our conſtitution in one inſtance, and you have a pretext for departing from it in another. Thus precedents, accumulated into laws, have, in different ages and countries, converted free into arbitrary governments. In proportion as ideas of disfranchizing and oppreſſing any claſs of men, become familiar,

in

in that proportion are new avenues opened for the exerciſe of injuſtice, faction, and tyranny. Every act of juſtice, on the other hand, but eſpecially every reparation of injuſtice, is an homage paid to the genius of Freedom, and adds freſh vigour to our political ſyſtem.

I have been led into theſe reflections by frequently revolving in my mind the ſuppoſed diſqualification (for it is not ſtatutory) of the eldeſt ſons of the peers of Scotland to elect, or be elected from that country to parliament: a ſubject, which a late event in the Houſe of Commons * naturally recalls to the mind of all who are either particularly intereſted in the rights and privileges of that order of men, or concerned, in general, in the preſervation

* Lord Elcho's vacating his ſeat for a diſtrict of Scotch burghs, in conſequence of his father's ſucceſſion to the peerage of Wemyſs.

preſervation of that equal ſpirit of freedom and juſtice, which is the animating principle of the Britiſh government.

On the occaſion of ſuch an event, it is not unnatural to take a general retroſpect of the origin, progreſs, and preſent ſtate of the parliamentary repreſentation of Scotland; to trace the circumſtances of the times by which the eldeſt ſons of the great barons, or Peers of that country, came to be excluded from that privilege; to weigh the legality and the force of thoſe deciſions by which their excluſion has been effected; and to conſider, whether their reſtoration to the privileges of their fellow-citizens, would, at the preſent moment, be either inconſiſtent with the genius of our government, or with political expedience.

In

In all kingdoms where the feudal ſyſtem has been eſtabliſhed, a ſtriking ſimilarity is obſerved in the original conſtitution of their general conventions or parliaments. Theſe aſſemblies were at firſt compoſed of the immediate vaſſals of the prince or chief, who were *all*, indiſcriminately and without exception, bound to give perſonal attendance when required: a condition which formed at that time, a part of the political ſyſtem, though it afterwards, from varying circumſtances, underwent in *the* ſeveral countries various alterations. A ſtrong ſimilarity is alſo apparent, not only in the original conſtitution of the parliaments of England and of Scotland, but likewiſe in the changes which were introduced into thoſe meetings afterwards; and whether it aroſe from mutual intercourſe in peace, or fierce inroads in war, Scotland, in proceſs of time,

time, adopted the innovations which had previouſly taken place in England.

The commercial genius which pervaded this nation, and which it cultivated with great ſucceſs, increaſed the conſequence of the people, and there produced thoſe alterations at an earlier period, which the influence of the ariſtocracy, or great vaſſals of the crown retarded in Scotland, until the monarch ſeized the favourable opportunity of converting them into engines of controlling that very power, by the predominancy of which their introduction had, for a time, been prevented.

Nor was the political reſemblance between England and Scotland confined to the conſtitution of parliament alone.* Glanville's

* The obſcurity in which the more antient hiſtory of Britain is involved, renders it difficult to trace with accuracy,

Glanville's Treatiſe on the Law of England, and the Regiam Majeſtatem on that of Scotland, are, in their proviſions, almoſt ſimilar. The chief diſpute on this ſubject among antiquaries, is, which of the two treatiſes is the oldeſt.* The practice alſo, in Scotland, of appointing certain officers on this ſide, and beyond *Forth*, and that in England, on this ſide and beyond *Trent*, took place probably in imitation of each other. This paſſion of imitation, ſo natural to mankind, derived additional force from the ſituation of the iſland, and its conſequential *dis*-connection, in *former* times, with the kingdoms on the continent.

In both countries, the conſtituent members of parliament, who were bound, in the true

 ſpirit

racy, that *original* connection, which the ſame language, (that of Wales and the Highlands of Scotland excepted) the ſame manners, cuſtoms, and ſubſequent alterations, demonſtrate; and of which many inſtances might be given.

* See Eſſays on Britiſh Antiquities, Eſſay I.

ſpirit of the feudal ſyſtem, to give their perſonal attendance in thoſe aſſemblies, were, the *libere tenentes*,* under which denomination were comprehended the *great nobles*, as well as the leſſer barons or freeholders. It is immaterial to enquire at what period the king's burgeſſes were admitted into parliament. This latter claſs, however, were known to ſit there by repreſentation, long before that of leſſer barons or freeholders within the ſhires. In each of the two kingdoms, the ariſtocracy, or great barons, acquired a decided pre-eminence, and the leſſer barons, uneaſy in thoſe aſſemblies, in their inferior ſituations, began to abſent themſelves from the meetings of parliament. In both kingdoms, the reſpective monarchs endeavoured to counteract the over-grown weight of the *great*, by means

* Although the feudal ſyſtem thus limited *parliaments* to the crown vaſſals, *the national aſſemblies*, before the eſtabliſhment of that ſyſtem, appear to have been more *extended*. Nor until then, had the word *parliament* occurred in Britain.

means of the attendance of the *leſſer* barons, who were exempted from the obligation of perſonal attendance, on condition of their ſending repreſentatives from each ſhire or county in the kingdom.

In England, the fortunes acquired by commerce, raiſing their poſſeſſors from ſituations of obſcurity within the recollection of the nobles, and operating on the patrician pride of this order, was, in all probability, the principal cauſe of the diviſion of parliament into two diſtinct houſes. This circumſtance, with that *controul* which the commons afterwards acquired over the public purſe, has ripened into a conſtitution that has long been the admiration of the world. In Scotland, again, where the people had not acquired a ſpirit of induſtry, the power of the great barons remained unchecked. In the proceedings of parliament their

influence was ſtill ſupreme and unrivalled. There was not, of courſe, the ſame motives as in England, to occaſion the ſeparation of parliament into different houſes. Their predominant power in the national aſſembly, joined to the arbitrary extent of their hereditary juriſdictions, inveſted thoſe feudal chiefs with the actual government of the kingdom.* Theſe private juriſdictions having been reſerved by the Union, it was not until 1747 that they were *re*-aſſumed by the crown. Their injurious conſequences to the ſafety of the kingdom were diſplayed in thoſe deſperate attempts, which had taken place in favour of the houſe of Stuart. "And, being "deemed

* Mr. Hume, in his Hiſtory of England, vol. 6, p. 353, anno 1641, obſerves, that, "The Engliſh were "at that time a civilized people, and obedient to the "laws; but among the Scots, it was of little conſequence "how the laws were framed, or by whom voted, while "the exorbitant ariſtocracy had it ſo much in their power "to

" deemed private property, it was remark-
" ed that their holders might part with
" them for an equivalent. They were
" accordingly re-annexed to the crown,
" by 20 Geo. II. c. 43: and one hundred
" and fifty thouſand pounds bought back
" to the nation the juſtice and freedom
" which had paſſed away from it." It is from that period only that the people in Scotland can be ſaid to have been real partakers of the Britiſh conſtitution.

The parliament of Scotland was thus compoſed of all who held landed property, *in capite*, of the crown; who were bound to attend in that aſſembly, whatever

" to prevent their regular execution." It is immaterial whether that ariſtocratical influence was poſſeſſed by peers, or by commoners of great eſtate. Before repreſentation was introduced, they ſat equally in parliament; and after that introduction, they were certain of being elected when they deſired it.

whatever might be the extent or value of their property.* This duty came ſoon to be conſidered by thoſe in poſſeſſion of *ſmall* eſtates, not ſo much in the light of an honourable privilege, as in that of an oppreſſive obligation. It was a long time even in England, before men came to entertain ideas of the importance of *ſeats* in parliament: but in Scotland, where thoſe aſſemblies were ſtill ambulatory with the king, and

* See Mr. Wight on Elections, 4to, Edin. p. 49.—By 1425, c. 52, it is enacted, "That all prelates, "erles, barronnes, and freeholders of the king with-"in the realme, ſin they are halden (ſince they are "bound) to give preſence in the king's parliament, and "general council, &c. &c." And by 1489, c. 16, "The "free tenants of the prince, (the king's eldeſt ſon) were "ordered to give ſuit and preſence in parliament, until "the king ſhould have a ſon to anſwer for them therein." Robert III. had erected certain lands into an *appanage*, for the eldeſt ſons of the kings of Scotland, which was called *the principality*. The titles of the prince are, Duke of Rothſay, Earl of Carrick, Baron of Renfrew, Earl of Roſs, Lord of the Iſles, and Great Steward of Scotland.

and held generally within the walls of one of his fortreſſes, and where the pre-eminence of the *great* ſo far eclipſed the conſequence of the *leſſer* barons and the burgeſſes, the obligation of perſonal attendance muſt have appeared ſtill more irkſome.

The great barons, on the other hand, were naturally flattered by the privilege of perſonal attendance, and juſtly accounted themſelves the hereditary adviſers of the prince, and the directors of the affairs of the nation.

James I. of Scotland, deſirous to relieve his ſmall barons from the burdenſome obligation juſt mentioned, and at the ſame time to ſecure the attendance of a certain number of them at leaſt, as a counterpoiſe to the great barons, had influence to get it enacted by 1427, c. 101. *item*, " The " king

" king with the conſent of the haill " council generallie, has ſtatute and or- " dained that the ſmall baronnes and free " tenants need not cum to parliament " nor general councils, ſwa that of ilk " ſhiref-dome, there be ſent, choſen at the " head-court of the ſhiref-dome, twa or " mae wiſe men after the largeneſs of the " ſhiref-dome, the quhilk ſall be called " the commiſſaries of the ſhires." It ſeems to have been intended, at the ſame time, to have modelled the parliament of Scotland on that of England; the act here quoted further providing, " and be thir commiſ- " ſaries of all ſall be choſen ane wiſe man " and expert called *the common ſpeaker of* " *parliament*, the quhilk ſall propoſe all and " ſundrie neids and cauſes perteining to " the commouns in the parliament or " general councill."* This act of parliament

* This monarch, who had been educated in England, and who appears to have been greatly intereſted in the improvement

ment does not, however, appear to have produced a more regular attendance of the leſſer barons, who not only ſeem to have given up perſonal attendance, but alſo to have been negligent in ſending their commiſſioners. It is alſo to be remarked, that it did not determine what conſtituted a *great* or *parliamentary* baron, or define thoſe who were exempted from perſonal attendance. That diſtinction was afterwards, by 1457, c. 75, confined to ſuch as were poſſeſſed of an eſtate valued at 20l. which rate or ſtandard was, by 1503, c. 78, extended to one hundred merks, thus, "*item*, "It is ſtatute and ordained, that frae "thenceforth, nae barronne, freehalder, "nor vaſſal, quhilk are within one hun-

 "dred

provement of his kingdom, was prevented from compleating the diviſion of his parliament into ſeparate houſes, by his untimely fate. Nor did the commons afterwards exerciſe the privilege of chuſing a ſpeaker. The whole members continued to ſit in one aſſembly, and the chancellor was, from his office, *preſident of the parliament*.

" dred merks of this extent that now is,
" be compelled to cum perſonally to the
" parliament, but if it be (unleſs) that our
" ſoveraine lord write eſpecially for them,
" and ſwa not to be unlawed for their
" preſence, and they ſend their procura-
" tors (proxies) to anſwer for them with
" the barronnes of the ſhire, * or the maiſt
" famous perſons, and all that are above
" the extent of one hundred merks, to
" cum to parliament under the pain of an
" auld outlaw." †

By 1587, c. 114, which in its conſe-quences eſtabliſhed the *repreſentation* of the leſſer

* There is alſo a diſtinction to be made between the *peers of parliament*, and the *barons of the ſhires*, who, by 1587, c. 114, came to be all included under thoſe *barons and freeholders* who were, in future, to act only by repre-ſentation. The freeholders or voters in the counties are ſtill, in Scotland, called the barons of the ſhires.

† Various acts of the Scottiſh parliament appoint fines to be levied from thoſe who abſent themſelves from their attendance in parliament.

leſſer barons, on a recital of 1427, c. 101, and, by which, proceeding upon the ſame motives of obtaining a counterpoiſe to the ſway of the great barons, (conſiderably increaſed ſince the Reformation, through the abolition of the abbacies) * *all* barons and freeholders, under the *degree* of prelates and lords of parliament (or peers) are appointed to ſend commiſſioners to parliament, and the right of voting at their elections is limited to freeholders having *fourtie ſhillings land in free tenandry halden of the king, and who have their actual dwelling and reſidence within the ſame ſhire.*†

* Wight on Elections, p. 58. Eſſays on Britiſh Antiquities, p. 42. The repreſentation of the church in parliament, although reſtored after the Reformation, was finally aboliſhed by 1689, c. 3, and the preſbyterian form of church government was confirmed at the *Union*.

† Before that period, all freeholders whatever of the crown within the ſhire, might have voted at the elections of the commiſſioners, and were obliged to contribute towards

Great oppoſition was made to that act, on the part of the nobility; ſome of whom even proteſted againſt it, though in vain.

Although, in the original conſtitution of parliament, every proprietor who held of the crown, was obliged to give attendance when required, yet the progreſs of population, and the increaſe of freeholders from the diviſion of property, muſt have,

wards defraying the expences of their commiſſioners while attending in parliament, and this was continued down to the *Union*. All thoſe acts above-mentioned were intended to favour the leſſer barons. Attendance in parliament was an obligation on the lower vaſſals, and to be relieved from the obligation of that attendance was, at that period, to be ſo far benefited. After 1587, c. 114, the leſſer barons, although that act did not in expreſs terms diſqualify them, ſat in parliament by repreſentation only; and whether or no they were, after that *period*, entitled to have attended in *perſon*, as they had done after the act 1427, c. 101, in the meetings of parliament and conventions, particularly that in 1560, is now a point which the proviſions of ſubſequent ſtatutes have rendered of little moment.

have, ſooner or later, led, not only to the introduction of parliamentary repreſentation, in order to have prevented tumultuous aſſemblies, but alſo to a limitation of the right of voting at the election of thoſe repreſentatives. And, independently of the original limitation to *crown vaſſals*, the moſt natural, diſtinct, and permanent ſtandard or meaſure by which the right of voting in the ſhires can be determined, is the poſſeſſion of *land:* a ſpecies of property that beſt enables the legiſlature to define *who* may be entruſted with the privilege of an elector, and *where* that privilege is to be exerciſed; for a perſon, in poſſeſſion of property within Yorkſhire, is not in virtue of that property, to vote in Middleſex.

It is alſo a principle in the inſtitution of parliamentary repreſentation, that every man who votes in the election of a repreſentative,

ſentative, ſhall be ſuppoſed, on reaſonable grounds, to have a *will* of his own. * Now the grand baſis of independent and free will is property. It is through this medium, that the legiſlature is to aſcertain thoſe citizens who may be ſuppoſed to poſſeſs a free and independent will, when it ſhall have become neceſſary to form a limitation in the qualification of the elector; nor ſhould that reſtriction be too far extended, nor removed from the acquirement of moderate induſtry. Accordingly, this is the firſt inſtance of a limitation in Scotland, in the extent of qualification requiſite to entitle a crown vaſſal to vote in the election of the commiſſioners of the ſhires, and except in the tumultuous reign of the unfortunate queen Mary, is the firſt legal intimation † that occurs of an alteration of ſentiment

* Blackſtone.

† On the meeting of eſtates in 1560, the leſſer barons and freeholders, having petitioned parliament reſpecting their

timent with reſpect to the obligation of parliamentary attendance.

The act of 1587, already mentioned, occaſioned, in a little time, a very great alteration in the conſtitution of the parliament of Scotland. Perſonal titles of peerage

their right to ſit in that aſſembly, were admitted, and attended in great numbers. The ſituation of Scotland, at that period, rendered a ſeat in parliament for the time a valuable privilege. They did not therefore, at that time, take advantage of the proviſion by 1427, c. 101, in their favour, by which they were entitled to have ſent repreſentatives. See Mr. Wight, p. 32. Many eldeſt ſons of peers ſat in the meeting of the ſtates in 1560, whoſe fathers were alſo preſent, and who, of courſe, did not derive their title to a ſeat in parliament, from their being only proxies for their fathers. Mr. Wight p. 269. A copy of the above petition, and of the roll of thoſe preſent in that meeting is inſerted in the Appendix, No. I. and II. By this it will appear, that the names of the eldeſt ſons of peers of parliament, who were preſent, and ſat as members, are included among thoſe of the leſſer barons and freeholders. They had alſo repeatedly ſat in former parliaments in the character of *members*.

peerage having been introduced into that country, a natural love of diſtinction conſpired with that principle of imitation, which has ſo large a ſhare in the government of human affairs, to *confine* perſonal attendance in parliament, without any conſideration of property, in like manner as had formerly taken place in England, to ſuch of the tenants *in capite*, as the will of the ſovereign had raiſed to the rank of *nobles*; although that act of parliament, as well as the former act, 1427, c. 101, were on that ſubject ſilent. From that period all other freeholders ſat by repreſentation only. Many proprietors of conſiderable eſtates, on whom that dignity had not been conferred, were accordingly prevented from attending in future in *perſon*. Theſe barons had ſeen with envy, the diſtinction which had been thereby occaſioned. They were hurt by this ſudden inferiority,

in

in a country at that time purely *feudal.* The want of induſtry, and the poverty of the people, adding force to the impreſſion thus made on their minds, they were anxious to diſtinguiſh themſelves from the maſs of the *leſſer barons* and freeholders, with whom they ſaw themſelves confounded.* Accordingly, on a recital, that the ſhires and ſtewarties had been in uſe to be repreſented in parliament and conventions, many regulations were made by 1681, c. 21, for preventing improper voters at the meetings of elections: and that ariſtocratical ſpirit being then prevalent, which ſtill has a powerful influence, and pervades the whole conſtitution of Scottiſh elections, the original ſpirit of the

* The additional reſtrictions in the 16 Geo. II. c. 11, ſ. 8, &c. as well as the unwillingneſs ſtill ſhewn in Scotland to extend the right of voting, ſeem to proceed on ſimilar motives.

conſtitution of parliament was ſtill farther departed from, and the right of voting was confined to thoſe poſſeſſing, " and publickly infeft in a fourtie ſhil- " ling land of *old extent*, or in the ſu- " periority of lands liable in payment of " publick burdens for his majeſty's ſup- " plies, to the extent of 400l. valued " rent."*

The

* This extent of qualification is further confirmed by 16 Geo. II. c. 11, &c. The requiſition in the act of 1681, c. 21, that the fourtie ſhilling ſhould be of *old extent*, was alſo reſtrictive of that of 1587, c. 114. Previous to the introduction of the valued rent, in the reign of Charles II. various *extents* or proportions, upon which the feudal caſualties were paid, had been from time to time appointed. The laſt of theſe was called the *new extent*; and having been inſtituted previous § to the act of 1587, there is reaſon to ſuppoſe, from the expreſſion of that ſtatute, that the right of voting was not by that former act confined to the *old extent*. The limitation in the act of 1681 to the *old extent*, is, however, analogous to the reſtriction of *valued rent* in the ſame ſtatute; the land-

§ 1457. c. 56. See Mr. Wight, p. 162.

The introduction of perſonal titles of peerage and of repreſentation, had in like manner produced in England a numerous claſs of barons and freeholders, who were thereby prevented from continuing to ſit in parliament in *perſon*. Had the government of that country remained equally ariſtocratical with that of Scotland, and the people equally uninduſtrious, we would have ſeen, there, in all probability, a ſimilar *reſtriction* of parliamentary repreſentation. But the vein of induſtry, the wealth, and the conſequence which the people acquired, prevented an effect ſo fatal to freedom. The more wealthy of the barons, now deprived of *perſonal* attendance, felt rather a pride in being at the head of the commoners. They found a numerous body

land-tax having been, previous to the introduction of the valued rent, raiſed in Scotland, although the feudal caſualties were not, on the *old extent*.

of men increaſing in conſequence and weight. The intimate connection between an extended repreſentation, and the exertions of induſtry in a free country, was unfolded; and the circumſtance, of the diviſion of parliament into ſeparate houſes, had already fixed the political exiſtence of the people. Having become members of a ſeparate houſe of parliament, the freeholders in the ſhires ſoon felt their conſequence, and were encouraged to extend the privileges they enjoyed; to which they were alſo induced by the number of royal boroughs whoſe inhabitants had already become reſpectable. Senſible of that importance which was derived from the union of many individuals, inſtead of reducing the number of voters, they retained the original limitation of a *fourtie ſhilling* freehold, without even making any alteration (which the principles of the Britiſh conſtitution, and perhaps the

reſpectability

reſpectability of the ſituation of an elector, would have warranted) in that qualification in proportion to the decreaſe in the value of money; and thus the number of voters were gradually increaſed, by means which were as certain, as they were ſlow and imperceptible.*

The limitation which took place in conſequence of the act of the Scottiſh parliament juſt mentioned, was alſo promoted by the inclination and views of the ſovereign. The meaſures of the crown, in that country, though they were

* While the valued rent (or calculation on which the qualification of a voter, and the proportions of the land-tax to be paid by land-holders, are now aſcertained) remains the rule of that qualification in Scotland, it is ſcarcely poſſible that any alteration, in conſequence of the decreaſing value of money, can take place; as it is probable that the improvements on eſtates will, on the whole, be proportioned to their ſituations at the time when their value was fixed.

were ſtill calculated to reduce the influence of the great barons, had undergone ſome alterations. It had been found in England, that to increaſe the weight of the *people*, not only operated as a counter-balance to that of the great barons, but alſo diminiſhed the prerogative and influence of the king.* In order to avoid a ſimilar conſequence in Scotland, a leſſer ariſtocracy was to be played off againſt the great barons. Thoſe among the leſſer barons of moſt conſiderable eſtates, were to advance in competition with the peers of parliament. Theſe parties were to diſplay their mutual jealouſies and contentions; while the ſovereign was to preſerve his pre-eminence and weight undiminiſhed; and the ſmaller proprietors of the country, and the great body of the people were to be annihilated in their parliamentary

* Bolinbroke on the Hiſtory of England, letter 12th. Henry VII.

liamentary character, and were ſtill to remain in the back ground. Accident, or perhaps a deſire to mark, that tenants of the *crown* were, as formerly, alone to enjoy a ſhare in the *repreſentation*, occaſioned the limitation in the above-mentioned act of parliament to *ſuperiority*: yet the expreſſion in that of 1587, c. 114, *in free tenandry halden of the king*, would have been equally expreſſive; and might have, in a great meaſure, prevented the evil of nominal and fictitious voters *now* ſo loudly cried down. It might have preſumed the neceſſity of property and ſuperiority being joined. No inſtance of a vote upon a *bare* right of ſuperiority, had in all probability occurred till ſometime after the act of 1681, for regulating elections, was paſſed.

Previouſly to 1587, c. 114, when the repreſentation of the leſſer barons was eſtabliſhed,

eſtabliſhed, the eldeſt ſons of peers could have ſat in parliament, not as eldeſt ſons of peers, but as *tenentes in capite* of the crown; * provided they were in poſſeſſion of eſtates held independent of their fathers or other intermediate ſuperiors. Nor is there a ſingle act of the Scottiſh parliament by which, when *qualified* according to the repreſentation eſtabliſhed by thoſe acts above mentioned, they are excluded from the right of ſitting in parliament. In what ſituation then are they placed? And to what claſs of citizens do they belong? Are they comprehended in the

* Dr. Gilbert Stuart, who has written in the ſpirit of controverſy, maintains, that thoſe freeholders alone who were in poſſeſſion of a whole knight's fee, were to attend in parliament; and that the obligation to do ſo, did not extend indiſcriminately to all tenants *in capite*. But whatever weight the acts of parliament, 1425, c. 52, and 1427, c. 101, above mentioned, may have in the ſcale of the oppoſite opinion, the ſituation of peers eldeſt ſons, in poſſeſſion of a whole fee held *in capite*, remains the ſame,

the rank of prelates and lords of parliament? All other barons and freeholders are appointed to attend in future by *repreſentation*. Did the obligation, then, of their perſonal attendance remain? And, after that period, were they entitled, with their fathers, to an hereditary ſeat? Yet they are held to be diſqualified from electing, or being elected into parliament from Scotland, on grounds which ſhall by and by be mentioned.

One other act of parliament ſtill remains to be conſidered, that of 1661, c. 35, which gives "a right of voting at "the elections of the commiſſioners, or "to be elected as ſuch, to all freeholders "of the king to a certain extent, except-"ing always from this act, *all noblemen* "*and their vaſſals*."

It is impoſſible to reduce the eldeſt ſons of the great barons, in all ſitua-

tions, within the meaning and the reach of this clauſe of diſqualification, by any fair conſtruction. By the term *noblemen*, in this clauſe, is clearly underſtood the great barons or peers who ſat in parliament in perſon, who had not been diſqualified from voting at elections by the former acts of the legiſlature, appointing the repreſentation of the leſſer barons, and whoſe privilege of voting in the election of commiſſioners, ſince they themſelves ſat perſonally in parliament, it ſeemed proper to aboliſh. When vaſſals of the nobility, their ſons were undoubtedly excepted; but the term *noblemen*, in the act juſt quoted, did not include any ſpecies of *tenants in capite* who did not ſit perſonally in parliament. The conſtitution of Scotland had preſerved, at leaſt in criminal caſes, a trial by a jury of equals. If the eldeſt ſon of a peer of Scotland committed a crime, however the courteſy

courteſy of the kingdom might have conſidered him as *noble*, he would not now be tried by the *peers*; for they are not his *pares curiæ:* he would be tried by a jury of commoners, perhaps indiſcriminately choſen. And he was not formerly, in the conſtruction of jury in that country, to be conſidered as among the *pares curiæ* of the peers of parliament, any more than of the leſſer barons and freeholders. They ſat mutually on each others juries; nor was the obligation, as in the trial of peers of parliament, that two-thirds of the jury ſhould be *peers*, extended to their eldeſt ſons.* Why therefore extend that diſqualifying expreſſion of 1661, c. 35, to them? Nor is it ſufficient to ſay, that before the year 1587 they ſat as *proxies* † for their fathers. The rolls of the meeting of the eſtates in 1560, and of previous parliaments,

* See Appendix, No. III. † Mr. Wight, p. 267.

ments, evidently ſhow that they alſo ſat in thoſe meetings in the character of members, and as tenants *in capite*.

If the great barons, before 1587, poſſeſſed the privilege of voting by proxy, they poſſeſſed it not excluſively, but in common with the leſſer barons and freeholders. By 1425, c. 52, it is ordained and ſtatute, " That all prelates, erles, bar-" ronnes, and *freeholders* of the king, with-" in the realm, ſin they are halden to give " preſence in the king's parliament and ge-" neral council, frae thencefoorth, be hal-" den to compeir in proper perſon, and " not by a procurator, (proxy); but, give " the procurator alledge there, and prove " a lawful cauſe of their abſence." It is alſo probable that a proxy might have then been held by any member of the aſſembly.*

But

* On this ſubject of proxies, ſee Wight on Elections, p. 50, and App. No. IV. where there is an inſtance of a letter

But at that period a ſingle voice was of little weight in the parliament of Scotland; and therefore it is natural to ſuppoſe, that the privilege of voting by proxy would be but ſeldom claimed.

Though the eldeſt ſons of the peers of parliament, after 1587, ceaſed to ſit perſonally, or to appear as proxies for their fathers, yet they were not annihilated as tenants *in capite*, nor could they in that character have been included in the clauſe of diſqualification above mentioned.

From thenceforth the proxies of the great barons could be held only by the peers of parliament; * and, if their eldeſt

letter of procuration or proxy from the abbot of Kelſo, with conſent of his chapter. It was given to two ſeparate men to vote for him in parliament.

* The repreſentatives of the leſſer barons ceaſed to exerciſe the privilege of voting by proxy, which had been previouſly

eſt ſons retained the privilege of attending the meetings of parliament, it was ſimilar to the right enjoyed by the ſons of the nobility in England, of ſtanding behind the throne in the houſe of peers. But neither the eldeſt ſons of the Scottiſh, nor thoſe of the Engliſh peers, though indulged with liberty of perſonal attendance, were permitted to argue or vote in the motion or queſtion in diſcuſſion. The principle on which that privilege was granted, or came to be poſſeſſed by the ſons of peers, whatever it may have been, cannot be ſuppoſed to have been affected in any degree by the circumſtance, that the parliament of England happened to be divided into two ſeparate houſes. And with regard to criminal trials, if the eldeſt ſons of peers are not, in

previouſly enjoyed by them when ſitting in perſon. Having become delegated commiſſioners, on the introduction of repreſentation, they were not allowed to ſub-delegate.

in Scotland, ſince the Union, appointed to attend on juries, (for in that country trial by jury in civil cauſes has long ceaſed) this circumſtance alſo perfectly coincides with what takes place on this ſubject in England. And, in both countries, the reaſon of the practice, which ariſes entirely from *courteſy*, is preciſely the ſame: not incapacity or diſqualification, but *propter honoris reſpectum*. The right of trial by jury, * is, however, a privilege of the greateſt importance; nor is there any claſs of men, however dignified their rank, that would not in the exerciſe of that privilege be honoured. It was not till the year 1710, that the peers themſelves were, in Scotland, by 8 Ann. c. 14, relieved from attending on the judges at the aſſizes.

Nor can any argument be drawn againſt the parliamentary rights of that body of men,

* See Appendix, No. III.

men, from their rank and precedence in ſociety. The act of parliament, 1695, c. 10, which fixed the different proportions of poll-tax in Scotland, after ſtating what leſſer proprietors and others were to pay, enacted, " That all heritors of one thou-
" ſand pounds of valued rent, and above
" the ſame, and all knights baronets, and
" and knights, be ſubject and liable to
" *twenty-four* pounds of poll-money, and
" that they pay for each of their children
" *in familia*, three pounds.

" That all lords pay 40l. of poll-money.

" That all viſcounts pay 50l.

" That all earls pay 60l.

" That all marquiſſes pay 80l.

" That all dukes pay 100l.

" That the ſons of noblemen pay ac-
" cording to their rank, viz. all dukes
" eldeſt ſons, as marquiſſes, and their
" youngeſt ſons as earls; all marquiſſes
" eldeſt ſons as earls, and their youngeſt

" as

" as viſcounts; all earls eldeſt ſons as
" viſcounts, and their younger ſons ſhall
" be liable in *twenty-four* pounds of poll;
" all viſcounts and lords ſons ſhall be li-
" able in *twenty-four* pounds of poll."

By this it appears that all viſcounts and lords ſons, whether elder or younger, were held *equal*, only, in that tax, to *heretors* of one thouſand pounds of valued rent; and that, if precedency was given to the eldeſt ſons of dukes and marquiſſes, it was alſo given to their youngeſt ſons, who had never been held to be diſqualified. Now, if the idea of a *quaſi* peer * can be entertained for a moment, how came it to paſs that the younger ſons of dukes and marquiſſes were not alſo held to be compre-

 hended

* Spottiſwood, ſays Mr. Wight. p, 269, aſcribes their diſqualification to their being held *quaſi* peers, and heirs of their fathers: the idea of a peer *quaſi* is too abſurd to be attended to; and, at any rate, what has that to do with their ſituations as tenants *in capite*?

hended under *noblemen*, in 1661, c. 35, and to be diſqualified under that idea, ſince they enjoyed precedency as well as the eldeſt?

In the parliament of Scotland, where the three eſtates of the realm ſat and voted in the ſame aſſembly, a queſtion could have been carried by a plurality of voices againſt the unanimous diſſent even of that eſtate to be thereby affected. *--- On paſſing the act of parliament, 1672, c. 5, reſpecting the privileges of the royal boroughs, the borough commiſſioners with one voice diſſented. And in 1649, on paſſing the act for allowing the value of annual rents, thoſe commiſſioners roſe, and

* In the parliament of Great Britain a ſimilar rule takes place in the Houſe of Peers, in the votes of the lords ſpiritual and temporal; and in the Houſe of Commons, in thoſe of the county and borough members. On the ſuppreſſion of church repreſentation, the three eſtates of the parliament of Scotland were, the nobility, the commiſſioners of the ſhires, and the burghs.—1690, c. 3.

and left the parliament;* yet thoſe acts were both paſſed into laws.

The idea of obligatory attendance in parliament, which had been entertained by the leſſer barons when that *repreſentation* was more extended, having thus, on its reſtriction to a *few*, in a great degree ceaſed, they now loſt ſight of the inconvenience of attendance, and, viewing it in a more favourable light, began to conſider it, not ſo much as a burden as a valuable privilege. The excluſion of the eldeſt ſons of the great barons, therefore, under the forced conſtruction, as will appear from the reſolutions afterwards mentioned, of their being repreſented † by their *fathers*, in an aſſembly conſtituted like the parliament of Scotland, where the three eſtates

* See Sir G. Mackenzie's Obſervations on the Acts of Parliament of Scotland.

† Wallace on the Peerage of Scotland, p. 426.

ſat in a collective body, where a vote could have been carried againſt the unanimous diſſent even of the ſtate to be thereby affected, and in which the nobility, from the political ſituation of the country, had ſo great an influence: the excluſion of the eldeſt ſons of the great barons, I ſay, in ſuch circumſtances as theſe, to the leſſer barons whoſe ſhare in the repreſentation was ſtill reſerved by the act of 1681, c. 21, appeared juſtifiable, though not by law, yet, perhaps, by political neceſſity. If, however, the eldeſt ſons of Scotch peers had been capable of being elected to repreſent the leſſer barons and burgeſſes in parliament, it was not as *eldeſt ſons* and *heirs* of their fathers, but as *freeholders*; and the ſame reaſon that would in that caſe have diſqualified them, namely, their being repreſented by their fathers, would have alſo diſqualified the ſon of any member of parliament whatever. In the character of freeholders, they ſtood uniformly

in

in the ſame ſituation. But the ſons of other members were not diſqualified, for in 1685, when Sir G. Mackenzie was created Lord Tarbat, both father and ſon were then in parliament. The ſons of all who ſat in parliament would have been in like manner repreſented by their fathers; and whether ſons of peers, or others, when elected into parliament, they muſt have been equally choſen by the freeholders, who ſat *not* in perſon, and, not by the peers who did.

The acts of parliament above mentioned provided, that the expences of the parliamentary commiſſioners from the ſhires, ſhould be defrayed by the barons and freeholders repreſented. For this purpoſe it is enacted by 1661, c. 35, and confirmed by 1681, c. 21, " Likeas his Ma-
" jeſty with conſent foreſaid, ſtatutes and
" ordains the whole heritors, life-renters,
" and wode-ſetters within each ſhire and
" ſtewarty,

" ſtewarty, to contribute for the charges " of the commiſſioners thereof, accord- " ing to their valuation, (the rent of " their eſtates in the ceſs or tax book of " the county) except only thoſe who hold " of noblemen or biſhops, or lands be- " longing to boroughs royal in burgage, * " and

* The inhabitants of the burghs royal were, in like manner, bound to defray the expences of their parliamentary commiſſioners, who, for a long time paſt were, and ſtill are elected by the town-councils of the burghs, and not by the burgeſſes. The town-councils alſo chuſe their ſucceſſors in office, whoſe number in Edinburgh is 33, in Glaſgow 29, and in Aberdeen 19. Thus the moſt populous towns in Scotland are thereby at the ſole and perpetual diſpoſal of a very inferior proportion of the inhabitants, double the above-mentioned number of the council in the ſame intereſt, and dependent for their official importance on each other, being ſufficient for that purpoſe. Nor is there any controul over the management of thoſe men, as appears from the late deciſions of the ſupreme courts of that kingdom.

The animated exertions which the burgeſſes are now making in Scotland, are applied to the correction of ſo unequal

" and alſo the expences of the foot-mantles."†

It may perhaps be ſaid, that this exemption in favour of noblemen and their vaſſals, afforded ſome colour of pretext for the excluſion of the eldeſt ſons of the great barons from parliament. But, if ſo argued, when that obligation to defray the expences of the commiſſioners ceaſed, all ſhadow of that reaſon will fall to the ground.

unequal a ſyſtem. They demand not a reform—but the re-eſtabliſhment of their antient conſtitution, as it exiſted previous to 1469, c. 19.—They claim a ſhare in the election of their magiſtracy, an opinion on the neceſſity of their contributions and town taxations, and an inveſtigation of their annual charges and accounts. But they interfere not with the election of their parliamentary commiſſioners.

† The foot-mantles were fine carpets, which were ſpread where the proceſſion or *riding* of the parliament was to paſs.

ground. It is farther to be obſerved, that a diſqualification on the ground of exemption from the expences juſt mentioned, would alſo have extended, by parity of reaſoning, to their younger ſons. Neither is that reaſon of excluſion applicable to burghs royal; for their eldeſt ſons being once created burgeſſes, and in poſſeſſion of property within the burgh, would, *ipſo facto*, have become liable to their proportion of the burgh ſtent (or tax) for defraying the expences of their parliamentary commiſſioners. The genius of thoſe times left, indeed, but little room for the exemplification of the caſe here ſtated. But times and manners are conſtantly undergoing alteration: and, at any rate, no diſqualification of their eldeſt ſons from being created burgeſſes, actually exiſted. And ſuppoſe even that the eldeſt ſon of a peer of parliament, previouſly to the Union, when

when the obligation to defray the expence of attendance in parliament determined, had been in poſſeſſion of an eſtate holding of the crown, diſtinct from his father's, and not erected into a *fief-noble*, would he not have been liable, in the proportion of that eſtate, to have contributed towards the expences of the commiſſioners from that ſhire within which his eſtate was ſituated? And if ſo, the above reaſon of excluſion could never even have had a real exiſtence.

The intent and meaning of that act, 1661, c. 35, however, ſeem to be, that difficulties having occurred in determining by whom the expences of thoſe commiſſioners ſhould be defrayed, the act was framed in order to ſettle that point, by determining who were their conſtituents. The great barons or noblemen, and the biſhops, ſat in parliament in perſon, re-

preſented the land held in vaſſalage of them, and were the crown vaſſals of thoſe eſtates.* They and their vaſſals had refuſed to contribute towards the expences of the commiſſioners ſent by the leſſer barons. Accordingly, that act of parliament excepted their eſtates from contribution, and, in return, provided that thoſe only who contributed to that expence, ſhould have a vote at the election of the commiſſioners. The eldeſt ſons of peers could not claim to vote as ſuch. Unleſs they poſſeſſed an eſtate *in capite*, they were not freeholders, and it might have happened, that no eldeſt ſon in Scotland was in poſſeſſion of ſuch an eſtate. But, poſſeſſed of an eſtate *in capite*, they could not have been excluded from parliament by any proviſion in that act. And if that act does

* By the conſtitution of the parliament of Scotland, none but crown vaſſals had, or yet have a ſhare in the repreſentation, except in the ſhire of Sutherland alone.

does not diſqualify them, there is no other ſtatute of the parliament of Scotland whatever, which refers to them in any degree with regard to their diſqualification, either directly or indirectly.

It is not a little to the preſent purpoſe to obſerve, that in a very minute account of the parliament of Scotland, and its different form from that of England, given by biſhop Burnet, the very year when the act here referred to was dated, in the Hiſtory of his own Times, * the incapacity of the eldeſt ſons of peers to elect, or to be elected to parliament, is not ſo much as méntioned either expreſsly or by implication.

Conſiderable weight has lately been laid upon the circumſtance of the ſhire of Kinroſs not being repreſented in parliament, when entirely the property of the Lords

* Vol. I. p. 185, anno 1661.

Morton and Burleigh;† and it is alledged, that had their eldeſt ſons been eligible, they would have then been ſent as commiſſioners to parliament. But, if any weight ſhould be thought due to that incident, may it not be aſked, had theſe two noble lords no ſecond ſons? Had neither of them any friend whom they might gratify by raiſing him to a ſtation of honourable diſtinction? Was it, that both theſe noblemen were without ſecond ſons, and without friends, that their property remained unrepreſented in parliament for a conſiderable ſpace of time? For ſo long the ſhire of Kinroſs was entirely in their poſſeſſion. The truth is, that at that period, a ſeat in parliament was not an object of ardent ambition. Fictitious and confidential voters were then unknown. The two lords who were the ſole proprietors of the county of Kinroſs, and who ſat in the ſame aſſembly with the commiſſioners

† Sir. John Sinclair, p. 43.—Mr. Wight, p. 216, and p. 462.

miſſioners of ſhires, did not conſider an additional vote as a matter of any great conſequence; nor would the eldeſt ſons of the great barons, at that time, have conſidered the parliamentary repreſentation of the leſſer barons and burgeſſes, as any conſiderable addition either to their honour or importance.

The great barons then poſſeſſed a preeminence in thoſe aſſemblies; that mutual jealouſy above-mentioned was in full force; and the reign of Charles II. ſurely was not the period of popular influence in parliament.

The Earl of Morton diſpoſed of his property in the ſhire of Kinroſs, to Sir William Bruce of Balcaſkie, in 1681. Had his lordſhip retained poſſeſſion of that property but a few years longer, until the *Revolution*, when a ſeat in parliament came for a ſhort period, to be more eagerly

fought

ſought after, it is probable that an attempt would have been made to introduce his ſon as a member of that aſſembly; and a regulation, in all probability, would have been eſtabliſhed in the ſhire of Kinroſs, ſimilar to that which takes place in the county of Sutherland, " which was held " *in capite* entirely by the Earl of Suther- " land, whoſe vaſſals were permitted to " ſend repreſentatives to parliament."*

Mr. Wight obſerves, " That Sir Wil- " liam Bruce, on his purchaſe from Lord " Morton, thought it requiſite to apply " to the king, before he took upon him " to repreſent the county of Kinroſs in " parliament."† The length of time, however, during which that county remained

* See 16 Geo. II. c. 11, where the former practice of that county is confirmed.

† Wight on Elections, p. 210—See alſo his Appendix, No. XXXIII.

mained unrepreſented among the leſſer barons, * probably gave occaſion to the application made by Sir William Bruce; nor could he, perhaps, with propriety, have aſſumed his ſeat without making that application, on account of that length of time. In England, the borough of Barnſtaple having neglected to ſend its repreſentatives to parliament down to the reign of Edward III. then claimed, and was inveſted in its antient privileges which it had enjoyed before the conqueſt. Agmondeſham, Windover, and Great Marlow, in like manner, after an interruption of four hundred years, claimed, and were found by the commons

* The Earl of Morton, and the Lord Burleigh, being themſelves noblemen, did in parliament repreſent their own lands. Minute of parliament, 18th of Auguſt, 1631. *Quer.*—Would that inference be applicable to their eldeſt ſons? Would they as *noblemen* have repreſented their own lands in parliament; or were they in thoſe days incapable of holding landed property diſtinct from their fathers?

commons and by the king to be parliamentary boroughs by preſcription.†

It cannot, and it is not alledged, that the inelegibility to parliament of the eldeſt ſons of peers in Scotland reſts on any diſqualification by *ſtatute*. The only foundation on which it depends, is, two, and but two *reſolutions* of the Scottiſh parliament: and theſe we now proceed to examine.

Of both theſe reſolutions it may be obſerved, that they paſſed in times when the excluſion of the eldeſt ſons of peers from all ſhare in parliamentary repreſentation in Scotland may be clearly traced to cauſes, very different from any which can be connected with the conſtitution of her parliament, or founded on feudal principles. The reſolution

† Brown Willis. Lyttleton's Hiſtory of Henry II. vol. iii p. 389, Dr. G. Stuart, p. 326.

ſolution * of the 23d of April, 1685, by which Lord Tarbat's ſon vacated his ſeat, on the preferment of his father to that title, paſſed in the reign of James II. a period of oppreſſion too well known.--- Among the articles of grievances preſented, in conſequence of their declaration and claim, or bill of rights, by the Scottiſh parliament at the Revolution, there is one, the eleventh, ſetting forth, " That moſt of " the laws enacted in the parliament of " 1685 are impious and intolerable grievances." † Nor is it wholly unreaſonable to ſuppoſe, that the diſqualification of the maſter of Tarbat to continue to repreſent the ſhire of Roſs after his father, who was

H high

* That reſolution is as follows---*Edin. 23d April*, 1685. " In reſpect the Viſcount of Tarbat's eldeſt ſon was elected " one of the commiſſioners for the ſhire of Roſs, by rea- " ſon that his father is nobilitate, cannot now repreſent " that ſhire as one of their commiſſioners; warrant was " given to the freeholders of that ſhire to meet and elect " another perſon in his place."

† Acts of parliament 1689, c. 18.

high in adminiſtration, (and whoſe political conduct, particularly his ſubſervient acquieſcence in the views of the crown, is well known) * was raiſed to the peerage, firſt under the title of the Viſcount Tarbat, and afterwards that of the Earl of Cromarty, may have been obtained by miniſtry, and carried through in parliament, from other motives than the merits of the queſtion. It was the firſt inſtance of the kind that had occurred; and it was eaſier to obtain a precedent in one of their own friends vacating his ſeat, than in a queſtion on a conteſted election, or when an inſtance, as in England, might occur in ſucceſſion.

It is of great importance, on the preſent ſubject, to obſerve, that the chief barrier which was oppoſed in Scotland to the deſpotic

* Sir George Mackenzie was at that period Lord Clerk Regiſter; he had before been Lord Advocate of Scotland; both offices then of great truſt.

potic principles of the reign of James II. conſiſted in the influence of the great barons. In order to cruſh, or at leaſt to prevent the increaſe of this influence in the proceedings of parliament, the very firſt opportunity was to be embraced, of eſtabliſhing a precedent that might exclude the eldeſt ſons from the right of ſitting and voting in that aſſembly. That which aroſe on the creation of Lord Tarbat, was the moſt fortunate for their views that could be well imagined, and it was not neglected. For, although the right of ſitting by repreſentation in parliament was not conſidered, at that period, to be of any great moment in Scotland, and the leſſer barons in general, and the people, had not then attained much weight; yet the importance to which the commons and the parliament of England had riſen in the reign of Charles I. was too freſh in the recollection of his ſon, not to ſway and direct his meaſures of government.

With regard to the other reſolution of the Scottiſh parliament reſpecting the excluſion of the eldeſt ſons of peers, it was paſſed on the 18th of March, 1689, * immediately after the Revolution, when that fortunate event, and the growing connection with England had of a ſudden infuſed throughout Scotland high notions of independence and liberty, and the whole iſland for the time glowed with the genuine enthuſiaſm of freedom. It has already been hinted,

* Edin. 18th March, 1689. " The meeting of eſtates " having heard the report of the committee for elections, " bearing, that in the controverted election for the burgh " of Linlithgow in favour of the Lord Livingſtone and " William Higgins, it is the opinion of the committee, " that William Higgins's commiſſion ought to be pre- " ferred: Firſt, in regard of Lord Livingſtone's incapa- " city to repreſent a burgh, being the eldeſt ſon of a peer. " Secondly, in reſpect that William Higgins was more " legally and formally elected by the plurality of votes of " the burgeſſes. They have approven and approve the " ſaid report in both heads thereof, and interpone their " authority thereto."

ed, that the limitation of voting at elections by the act of 1681, to thoſe "poſſeſſing and "publicly infeft in the ſuperiority of land "liable in payment of public burthens to "the extent of 400l. of valued rent,"* had produced the effect of creating in the kingdom a ſecond ariſtocratical party, equally inauſpicious to freedom and general liberty. The vote of 1689 was paſſed at a time when this party, who had but too ſenſibly felt the political influence of the great barons, took advantage of the general enthuſiaſm of that period; and about the time of the ſuppreſſion of the Lords of the Articles, who had been conſidered as one of the greateſt grievances † under which the

* See Appendix, No. IV.

† The Lords of the Articles were a committee of parliament elected from the different eſtates, under pretence of eaſing the weight of the buſineſs. They were to prepare

the nation had ſuffered. That committee of parliament formed the firſt complaint in the articles above-mentioned, given in by parliament in 1689, and was aboliſhed by 1690, c. 3.

Thus, a principle of government, contrary to what had directed the reſolution of the 23d of April, 1685, but equally tending to reduce the influence of the nobility or great barons, operated in that of 18th March, 1689. But, in neither of theſe reſolutions do the merits of the caſe appear to have been inveſtigated.

The

pare thoſe motions and overtures which were to be preſented to parliament; and it came at length to be underſtood, as in the ſtatute of POYNINGS reſpecting Ireland, that no motion could be introduced into parliament, or be debated in that aſſembly, unleſs its introduction had been previouſly approved of by the Committee of the Articles; by which means that committee, whoſe election was almoſt intirely in the power of the crown, poſſeſſed a negative before debate on the proceedings of parliament, and no motions could be introduced but ſuch as were agreeable to their views. †

† See Burnet's Hiſt. of his own Times, vol. i.

The committee of the Scottiſh parliament for determining controverted elections, was neceſſarily compoſed of the commiſſioners for ſhires and burghs. Thoſe who ſat in parliament in perſon, in all probability made no part of that committee; and, had the nobility been diſpoſed to have conteſted the *principle*, they were effectually prevented by the *ſecond* point of diſqualification in the reſolution juſt mentioned. " In reſpect, William Higgins " was more legally and formally elected " by the *plurality* of votes of the bur- " geſſes."

It may be aſked why no attempt was made in Scotland, after 1689, to bring this point of diſqualification to an iſſue.

The glow of freedom which prevailed in Scotland about this time, was but of ſhort duration. A temporary enthuſiaſm

for

for liberty ſoon yielded to the natural operation of her political conſtitution. The diſtance of the ſovereign, the over-bearing influence of ariſtocracy, the total want of connection between the people at large and parliament, the commercial ſacrifice that was made of Scotland in the affair of Darien,* and the deſpotic tendency of the heritable juriſdictions,

* The commercial ſpirit which began to appear in Scotland ſince her connection with England, while a ſeparate kingdom, but under the ſame ſovereign, towards the end of the laſt century, induced the people of Scotland to attempt the eſtabliſhment of an extenſive commercial colony on the Iſthmus of Darien, in America. This company was called the African, or Indian Company; in which the wealth of the country was deeply engaged. That attempt, after the nation had been at an enormous expence, the commercial jealouſy of England, and the remonſtrances of Spain, rendered abortive. The colony was abandoned, and the failure of the undertaking was a national calamity. The commercial ſpirit ſunk; the people again fell back into their accuſtomed ſubjection, apathy, and indolence; nor did they in any degree emerge from theſe, until the abolition of the *heritable* juriſdictions.

juriſdictions, inſtead of cheriſhing thoſe latent principles of liberty which are ſo congenial to human nature, chilled their warmth, and checked their riſing growth.*

The great proprietors regained their influence, nor did their ſons continue to look upon a ſeat in parliament as any mighty object of ambition. The crown alſo re-

 ſumed

* The two laſt articles in the liſt of grievances, preſented by the parliament of Scotland at the Revolution, were, " That all grievances relating to the manner and " meaſure of the liedges, their repreſentation in parlia- " ment, be conſidered and redreſſed in the firſt parlia- " ment.

" That the grievances of the burghs be conſidered and " redreſſed in the parliament."

No ſuch redreſs, however, took place; for, with the ſingle exception of the additional repreſentation given to the larger ſhires, by 1690, c. 11, the act 1681, c. 21, remained the chief regulating act of county elections, until 16 of Geo. II. c. 11. The grievances of the burghs have not even yet been taken into conſideration, and are now before parliament.

ſumed its ſway, and its jealouſy of the great barons. And, had not the nation been happily ſaved by the Union, Scotland, in all probability, would have relapſed into the languor of tyranny. That treaty, with the meaſures which were afterwards adopted by government, emancipated the people from the ſervile dependence, in which they had been kept by the pride and the policy of the landed proprietors, long after the ſpirit of the feudal ſyſtem had been extinguiſhed. Nor was that ariſtocratic influence enjoyed only by the nobility. In every great alteration of the political ſyſtem of a country, there are ſome upon whom the change will bear harder than on the reſt. The introduction of perſonal titles of peerage, with an hereditary ſeat in parliament, and of repreſentation, by 1587, c. 114, left, as has been already obſerved, a number of ariſtocratical chiefs, upon whom the ſove-

reign

reign had not conferred the dignity of peerage. They were deprived of their right of ſitting *perſonally* in parliament, which they had before enjoyed. They ſtill, however, retained their weight as *great proprietors*. Nor was the diſqualification here complained of extended to their ſons.

The proſpect of an union with England, however, and of an incorporation of the parliaments of both nations, produced in Scotland a great alteration in the opinion that was entertained of the importance of parliamentary attendance. The commons in the parliament of England had long enjoyed a very conſiderable ſhare of political power and conſequence. And, on the incorporation of the parliaments, a ſeat in the national aſſembly became a matter of reſpect, and an honourable diſtinction throughout Scotland. It was therefore to be expected, that an anxiety on that ſubject

would ariſe, and a jealouſy be diſplayed of the *extenſion* of that privilege. Accordingly, when the mode of electing the repreſentatives from ſhires and burghs, allowed in the treaty of Union to Scotland in the parliament of Great Britain, was debated in that of Scotland, 27th January, 1707,* it

* De Foe, in his Treaty of the Union, p. 212, obſerves, " That the motion againſt the eldeſt ſons of peers " had not a little to be ſaid for it, particularly, that " when the influence of the nobility in Scotland comes " to be conſidered, with the ſmall number of members " to be choſen, it might in time come to riſe to what was " hinted before, in that project of reducing the lords " that did not ſit in the Houſe of Peers, to a level with " the commons; that then it might come to paſs, that " Scotland ſhould be repreſented only by her nobility, " and that there ſhould be Scotch lords in the parliament of Great Britain. So here in time it might happen, that the nobility in the Houſe of Peers, and their " eldeſt ſons in the Houſe of Commons, might make up " the whole of the repreſentatives of Scotland.

" There were a great many arguments brought againſt " this propoſal, but theſe ſeemed the moſt prevailing, viz.

it was propoſed to have expreſsly diſqualified both the *peers* and their eldeſt ſons, (who *now* alſo began to entertain far different ideas of the importance of parliamentary attendance by repreſentation,) from enjoying any ſhare in that repreſentation; nor was a ſhare in that repreſentation to be extended to the *people*. It is not however apparent, why the *peers* were included in that motion, who certainly, unleſs *then* expreſsly granted to them, could not have had any ſhare in the repreſentation

" viz. 1ſt, That it had been always allowed in Scotland be-
" fore, viz. that the eldeſt ſons of peers might be elected.
" 2d, That the eldeſt ſons of peers do ſit in England in
" the Houſe of Commons; and it would break in upon the
" rule of equalities to alter it, and put the Scotch gen-
" tlemen in a worſe condition than the Engliſh.

" After ſome time, a vote was offered that put it to an
" end, viz. to let the right of being elected remain juſt
" as it was, without any alteration at all; that he that had
" a right or capacity to vote, or to be choſen before,
" ſhould have ſo ſtill; and this ended the debate."

preſentation of the commons, in conſequence of the act, 1661, c. 35, abovementioned. And with regard to their eldeſt ſons, had the proviſion of that act of parliament, excepting from the right of voting at elections all *noblemen* and their vaſſals, been ſufficiently expreſſive, as now alledged, that motion would have alſo been equally unneceſſary to have excluded their *ſons*.

Although by the treaty of Union, the peers were to ſit in future only by repreſentation from their own order, that repreſentation was to be regulated by conditions and obligations diſtinct from thoſe that took place in that of the commons. In this, a property held of the crown was neceſſary to conſtitute the privilege of the elector. But the whole order of the peerage of Scotland were, in virtue of that treaty, to poſſeſs, independently of property,

perty, the right of repreſentation in the Houſe of Lords, and every privilege of peers of Great Britain, tha tonly excepted, of an hereditary ſeat in parliament. And, in addition to this reaſoning, it has already been ſhewn, that the two diſqualifying reſolutions of 1685 and 1689, were not deciſive of the point to which they referred, but founded ſolely in the views of party. Though it is admitted that theſe, at the period when they were adopted, may have been attended with effects which were convenient and ſalutary to the political ſtate of the country, it will as readily be allowed, that they were paſſed, on principles which, now that the civil conſtitution of Scotland ought, by means of the union with England, to have recovered its original ſpirit of equality and regard to the rights of mankind, cannot be conſiſtently maintained by a Britiſh parliament.

On the motion in the parliament in Scotland, " That no peer, or the eldeſt ſon of " any peer, can be choſen to repreſent " either ſhire or burgh of this part of the " united kingdom (Scotland) in the Houſe " of Commons of Great Britain," there voted for that motion, of the nobility, two; of the barons and commiſſioners of ſhires, forty-ſeven; and of the burgeſſes, twenty-three: in all, ſeventy-two. That motion being negatived, a ſecond was propoſed, in theſe words: " That none ſhall elect, " nor be elected to repreſent a ſhire or " burgh in the parliament of Great Bri- " tain, from this part of the united king- " dom (Scotland), except ſuch as are now " capable, by the laws of this kingdom, " to elect, or be elected as commiſſioners " for ſhire or burgh to the ſaid parlia- " ment." For this motion there voted, of the nobility, ſixty-one; of the barons, five;

five; and of the burgeſſes, twenty: in all, eighty-ſix. *

From the reſult of theſe two motions, it appears reaſonable to preſume, that, had the diſqualification of the eldeſt ſons to repreſent the ſhires and burghs of Scotland been a point clearly eſtabliſhed, the firſt had probably been carried. There voted, on both motions, of the commiſſioners, ninety-five; and of the nobility, only ſixty-three.† Why, therefore, apply that clauſe of the act of parliament, 5 Ann. c. 8, " That none ſhall be capable to elect, or " be elected, to repreſent ſhire or burgh in " the parliament of Great Britain, for this " part of the united kingdom (Scotland),

* See Appendix, No. V.

† Of theſe 63, *two* were commoners, who, in right of their *offices*, voted among the *nobility*; the Regiſter, Sir James Murray, of Philliphaugh, Knight, and the Juſtice Clerk, Adam Cockburn, of Ormiſtoun, Eſq.

" except ſuch as are now capable to elect " or to be elected as commiſſioners for " ſhires and burghs to the parliament of " Scotland:"---Why, I ſay, apply this clauſe excluſively to the eldeſt ſons of Scotch peers, when their diſqualification, being directly moved in parliament on occaſion of the *Union*, was negatived by a conſiderable majority?

The proviſion of that clauſe will extend to many others to whom it has not been applied. It confirms the exiſting acts of the Scottiſh legiſlature reſpecting the repreſentation of ſhires and burghs in parliament. It corroborates the proviſions of 1427, c. 101---of 1587, c. 114---of 1661, c. 35---and of 1681, c. 21, &c. and it thereby provides, that the voters in the ſhires of Scotland muſt ſtill poſſeſs, and be publicly infeft in the ſuperiority of a forty-ſhilling land of old extent, or 400l. of

of valued rent. The High Treaſurer, the Treaſurer-depute, the Secretary, the Privy-Seal, the Maſter of Requeſts, the Clerk Regiſter, the Juſtice Clerk, and the Lord Advocate, when commoners, ſat in the parliament of Scotland, in virtue of their offices; and it was underſtood that they neither could elect nor be elected: for, "The Juſtice Clerk and the King's Ad-"vocate having voted at an election for "the county of Mid-Lothian, in 1675, "Lord Fountain-hall obſerves,* that they "ſhould not have voted, becauſe, being of-"ficers of ſtate, and as ſuch poſſeſſing a "ſeat in parliament, they were not capable "to be elected: and to elect and be elected, "*ſunt correlata quorum uno ſublato, tollitur et alterum.*† It was left unprovided by the treaty of Union, whether the King's Advocate, in virtue of his office, ſhould ſit in the parliament of Great Britain, or

* Vol. i. p. 352. † See Wight on Elections, p. 66.

no. His right of ſitting in that capacity has not been eſtabliſhed, nor has the proviſion of 5 Ann. c. 8, although applicable, been extended, either in bar of his elegibility from Scotland, or of his privilege of voting at elections: on the contrary, the Lord Advocate has, ſince the Union, been almoſt conſtantly a repreſentative in parliament from Scotland; and, with regard to his exerciſe of the right of voting at elections, it has been uniform and unvaried. The other great officers of ſtate who ſtill exiſt in Scotland, the Privy-Seal and Clerk Regiſter, are preciſely in the ſame ſituation. The office of Privy-Seal has been held by the Right Hon. James Stuart Mackenzie for many years, in the courſe of which he repreſented Roſs-ſhire until the general election in 1780; and that of Clerk Regiſter, by Lord Frederick Campbell, who now repreſents in parliament the county of Argyle. The Juſtice Clerk,

ſince

ſince the Union, is diſqualified by ſtatute from ſitting in parliament, becauſe he is a judge; but he may ſtill vote at elections.*

In the parliament of Scotland, no perſon could repreſent a burgh who was not a burgeſs of it.† And ſeveral inſtances of diſqualification occur upon that ground. But, ſince the Union, that qualification has been diſpenſed with. In 1774, Mr. Daſhwood was found capable of repreſenting the diſtrict of the burghs of Wigton, Whitehorn, New Galloway, and Stranraer, although he was not a burgeſs of either the one or the other.‡

The obvious reaſon with the parliament of Scotland for diſqualifying the eldeſt ſons of

* 7 Geo. II. c. 16.

† Letter from king Charles II. to the convention of royal burghs 1674, and act of convention in conſequence, in July 1675.

‡ Mr. Wight on Elections, p. 401, 2, 3, 4.

of her peers was, the power of their families: and a ſimilar jealouſy had alſo taken root againſt them in England; for, on the ſame ground of political expedience, not of juſtice, their diſqualification was confirmed in 1708 by the Houſe of Commons.* But if political expedience be removed, together with the danger to be apprehended from the cauſe on which it was founded, the diſqualification in queſtion falls to the ground, being unſupported by any plea either of juſtice or of political neceſſity. And, if all this be ſo, ought not the eldeſt ſons of the peers of Scotland to be reſtored to their rights of election? Ought not the candour of the Britiſh nation to be diſplayed, and her juſtice to be extended and eſtabliſhed?

At the Union, the parliament of Scotland conſiſted of 153 peers, † 90 commiſſioners

* Scot's Hiſt. of Scotland. Tindall's Rapin, ann. 1708, &c.

† Of thoſe 153 titles of peerage, about eighty have now either

ſioners from ſhires, * and 67 from burghs. Of the peers many were of Engliſh families, who had obtained titles of honour without being in poſſeſſion of property in Scotland, or ever wiſhing to aſſume their ſeats in the Scottiſh parliament. So that, allowing a reaſonable proportion for peerages veſted, at the time, in minors, females, or other diſqualifying ſituations, it is probable, that the number of parliamentary commiſſioners from the ſhires and boroughs, who might attend, and which jointly amounted to 157, would often, during the inveſtigation of that treaty in particular, have exceeded the number of peers

either demiſed or merged in other titles, either of Scotland or of Great Britain.

* See Wight, p. 75. Acts of *parliament* 1690, c. 11. "This ſtatute increaſed the number of the repreſentatives "of ſhires from 64 to 90. The number of the repreſen- "tatives of boroughs was then 66, viz. two from Edin- "burgh, and one from every other borough. The bo- "rough of Campbletown had not then been erected."

peers that might have been preſent in parliament.* This being the caſe, it is not a matter of wonder, if the intereſts of the peerage and of their ſons were at times neglected, or ſacrificed to a jealouſy of their power, in an aſſembly where the votes of the peers made part only of the collective whole.

In the point in queſtion, however, it was not the nobility of Scotland who contended

* By an act paſſed in the parliament 1641, the right of ſitting in that aſſembly was denied to peers who poſſeſſed not 10,000 merks (above 500l. ſterling) of annual rent in land within Scotland, at the time of their creation. Hume's Hiſt. of England, vol. vi. p. 353, 4. The parliament of Scotland, however, on the Reſtoration, reſcinded, without diſtinction, all the acts which had been paſſed during the Uſurpation, and ſince the parliament held in 1633, by 1661, c. 15. Thoſe Engliſh families who had obtained Scottiſh titles of honour, like the preſent peers of Ireland, might in future have claimed their ſeats, previouſly to the Union, in the parliament of Scotland, and ſtill vote at the elections of the *ſixteen*.

ed with the people: it was one ariſtocratical body contending with another. The commiſſioners from the burghs were, on the two motions, almoſt equally divided; and, with regard to the people, and ſmall landed proprietors in the ſhires: theſe were, at that time, as little regarded by parliament as the ariſtocracy itſelf could deſire, being cut off from all ſhare in the repreſentation of the counties by the act of 1681, as already mentioned.

It has been obſerved, in the courſe of treating this ſubject, that various and contrary ſentiments had been adopted by the Scotch, in a ſhort ſpace of time, with reſpect to the importance of parliamentary attendance. Let thoſe, to whom thoſe frequent alterations in opinion may appear extraordinary, recollect, that that nation had uniformly been quickly fired, and inured to ſudden reſiſtence: that the

power of the parliament of Scotland was originally very extenſive, although that power was poſſeſſed by an ariſtocracy only: that the ſovereigns had attempted to check this influence: that various antient records of the kingdom have been loſt, or if in exiſtence, been carried off into England: that the edition of the acts of parliament publiſhed in the reign of James VI. is *mutilated*, and deprived of almoſt every ſentence that made for the *power* of parliament, which a compariſon between it and the manuſcript copy in the Advocates library at Edinburgh, or the edition publiſhed in the reign of queen Mary, called the Black Acts, from being printed in the *Saxon* letter, will ſufficiently evince: that this mutilation of the ſtatute book ſeems to have ſprung from thoſe arbitrary notions of government which that prince entertained, and which at length deſtroyed that of his family: and that, violently as the

iſland

iſland of Britain reſiſted Charles the Firſt, in *twelve* years after that unfortunate monarch had laid his head on the block, both nations of which that iſland conſiſts, received back his ſon, with more extenſive powers than they had diſputed with the father.

The enthuſiaſm in favour of monarchy that prevailed at the period of the Reſtoration, is apparent in the preambles to the acts of the parliament of Scotland. They breathe almoſt an avowal of *indefeaſible and divine right*. Sir Archibald Primroſe, who, as Clerk Regiſter of parliament, had the management of drawing up thoſe preambles, ſays biſhop Burnet,* told him, that he verily believed he was bewitched on that occaſion; and that he then thought, he could not expreſs in *them* too much adulation

* Hiſtory of his own Times.

and ſatisfaction, at the happy event of the Reſtoration. Let it alſo be recollected, that the nation, although paſſive during the reign of Charles II. could not continue their forbearance in that of his brother James; and the Scotch, always enthuſiaſtic where intereſted, led the *van* at the Revolution.

The people of Scotland had, at that time, been ſpirited up by *both* the ariſtocratic bodies of which her parliament then conſiſted. But, the Revolution being once accompliſhed, it was not the intereſt of either ariſtocracy to follow it out with a parliamentary redreſs for the people. They would not have complained without *diſtinction* of the juriſdiction given by 1681, c. 18,* to the *crown* within the

* The act 1681, c. 18, not only confirmed the right of the crown to a cumulative juriſdiction within regalities and

the diſtricts of regalities and baronies, had they at that period been deſirous of ſuch redreſs. At the Union alſo, the ſhew of intereſt then diſplayed in the importance of parliamentary attendance, was confined to thoſe ariſtocratic bodies. A treatiſe publiſhed in 1703, on the antient power of the parliament of Scotland, attempted in vain to revive the *rights* of the people. The reſervation of the *heritable* juriſdictions evinced its inefficacy. Nor does the unwillingneſs to extend the right of voting in Scotland, which ſtill exiſts, argue as yet an alteration of thoſe ſentiments. But the nations are now united, and let the parliament of Britain diffuſe the ſpirit and intention of her happy conſtitution univerſally over the iſland.

While

and baronies, but alſo renewed to the king the privilege of judging cauſes in *perſon*. It was however the *cumulative* juriſdiction which parliament complained of at the Revolution. See Appendix, No. III.

While the excluſion of the eldeſt ſons of the peers of Scotland, though it derived its origin from the deſigns of the court, and was continued in the ſpirit of *party*, was covered and protected by the plauſible pretext of equality, and the balance of the conſtitution: to have expected a repeal of thoſe reſolutions by which that excluſion was eſtabliſhed, by the force of any appeal to public juſtice and candour, would certainly have been vain, and might alſo have been deemed improper. But times change, and new expedients are adopted in new ſituations. The circumſtances which render a meaſure or arrangement proper at one time, being changed, that meaſure or arrangement may become not only uſeleſs, but inconvenient and even detrimental: in the ſame manner that men are wont to throw open their doors and windows in ſummer, but to ſhut them in winter; and as the ſkilful mariner contracts or crouds his ſail according

cording to the varying gale or breeze. It has been ſtated above, that the juſtice of diſqualifying the eldeſt ſons of peers from electing, or being elected to parliament, was never made a ſubject of diſcuſſion. The ground of its juſtice or injuſtice is, therefore, yet entire: and it is on this ground alone, namely, that of political expediency, by a change of circumſtances being perfectly removed, that it ought in candour and fairneſs to be now conſidered.

But, on this leading point, it may be neceſſary, and cannot be improper, to inſiſt further. Lord Johnſtone, ſon of the Marquis of Annandale, was returned to the firſt parliament of Great Britain in 1708, from the burgh of Linlithgow; and Lord Haddo from the county of Aberdeen. A petition was given in, in the name of Sir Alexander Irvin of Drum, and the other freeholders of that county, againſt the return

turn in favour of Lord Haddo; and, counſel having been heard at the bar of the Houſe of Commons, on the part of the petitioners only, (for the others did not reply) a motion was made, " That " the eldeſt ſons of the peers of Scotland " were capable by the laws of Scotland, " at the time of the Union, to elect, or " be elected as commiſſioners for ſhires or " burghs to the parliament of Scotland, " and therefore, by the treaty of Union, " are capable to elect, or be elected to re- " preſent any ſhire or burgh in Scotland, " to ſit in the Houſe of Commons of " Great Britain." This motion paſſed in the negative; and next day, being the 4th day of December, 1708, new writs were ordered for electing other commiſſioners in their room.* No ſubſequent attempts have been made to aſcertain their right. Several inſtances indeed occur, of new writs being iſſued

* See Journals of the Houſe of Commons, *tertio die Decembris, ſeptimo Annæ reginæ.*

iſſued out upon the event of members having become eldeſt ſons of peers of Scotland; but all of them, as in the late caſe of Lord Elcho, in 1787, unaccompanied with an inveſtigation of the merits of the cauſe, and proceeding entirely upon the authority of the ſtanding order of the houſe juſt mentioned.

A fair opportunity was indeed offered of entering fully into the queſtion of diſqualification, on the rejection of the Lords Johnſtone and Haddo. But no arguments were offered on the part of theſe lords, in anſwer to the counſel for the freeholders, "becauſe their fathers, and the peers of "Scotland in general, would not ſo much "as admit a doubt of their elegibility, as "the eldeſt ſons of the peers of England en-"joyed a like privilege in that country."*

* See Scott's Hiſtory of Scotland, p. 746.

The counſel on the part of the free-holders reſted their argument on the danger that might accrue to the independence of the Houſe of Commons, from the influence of the nobility, and inſiſted, that, were the precedent in queſtion once admitted, the repreſentation of Scotland would be entirely in the hands of that order. But, in whatever degree that influence may have been detrimental to the liberty of the Scottiſh parliament, there is little danger to be apprehended from it to the cauſe of freedom at this day, when, in conſequence of the Union, the parliamentary repreſentatives of Scotland have been incorporated into a diſtinct and numerous aſſembly, when the commons have, in that country, at leaſt recovered their proportion in the ſcale of government, which even an inaccurate review of the preſent ſtate of her ſhires and burghs, and of their repreſentatives to parliament, will

will ſufficient lyevince to be the caſe; and when, let it be remarked, the commiſſioners of the ſhires are choſen by the freeholders of the county, and thoſe of the burghs by the leet (liſt) of the burghs.

If, however, a peer of Scotland ſhall ſtill retain ſuch influence in a county or burgh, as to carry the election in favour of his friend, whether is it more derogatory to the honour, or dangerous to the independency of parliament, that he ſhould move his intereſt, in order to procure the election of his eldeſt ſon, or that of his youngeſt ſon, or any of his confidential friends? Is political influence in that country more dangerous in the poſſeſſion of a peer of Scotland, than in the hands of a commoner of overgrown fortune? Or of a peer of Great Britain? Or of an Iriſh peer? Without entering into the juſtice or injuſtice of the *reſolutions*, not *formal*

and deliberate acts, excluding the eldeſt ſons of Scotch peers from parliament, and confining our views merely to its practical conſequences, has their diſqualification, in fact, prevented the interference of the Scottiſh nobility, or of other great proprietors, in matters of election? Or can it be ſuppoſed that the removal of their diſqualification would materially increaſe that interference? There is no man acquainted with the ſtate of Scotland, by whom ſuch an idea can be entertained. And in whatever ſituation their eldeſt ſons may be ſuppoſed to have ſtood, while the peers ſat in the ſame meeting with the commons, and formed but one collective body, that ſituation, ſince the Union, is completely altered. At a period when Scotland labour-ed under the tyranny of hereditary juriſdiction, when the weight of the great barons bore down the rights of the commons, it may have been neceſſary to controul the towering

towering height of their power, perhaps, by the diſqualification of their *eldeſt ſons*. But when that power is no longer dangerous to freedom; when no neceſſity of reducing it further exiſts; when the commons have recovered their equality: let the effect ceaſe with the cauſe, and every odious diſtinction be removed; let the *corruption* of elections in Scotland be deſtroyed, the influence which ariſes from property independent of character be removed, and nominal and fictitious voters be annihilated, if that nation ſhall deſire it; but do not deprive thoſe, whatever their rank or ſituation in life may be, who poſſeſs extenſive property, of that influence ſo grateful to the human mind, which they *only* enjoy as men.

Had the ſame arbitrary conſtitution in elections been eſtabliſhed in England which prevailed in Scotland, diſqualifications

fications might have been adopted in the former country ſimilar to what took place in the latter. But the democratical ſpirit which had made its way into England ſo much earlier than in Scotland, commercial habits and induſtry of every kind, and the conſequent ſecurity and independence of the people, rendered all ſuch diſqualifications unneceſſary. A very different order of affairs took place in Scotland, where the leſſer proprietors were harraſſed by their more powerful neighbours. Every baron poſſeſſed his caſtle and his juriſdiction. He conſidered himſelf as entitled to redreſs the injuries that were done to him by force of arms, and as the feudal lord and maſter of his people, who were not only bound to ſubmit to his authority in civil matters, but to ſupport that authority in all caſes, by military attendance.*

It

* Military ſervice was the foundation of the feudal ſyſtem. That ſervice, which the ſovereign required in the national

It was not until the abolition of the *heritable* jurisdictions* in 1748, that the people of

national militia, was parcelled out to each chief in proportion to his property—he led his vassals to the feudal army, and he required their assistance in his own quarrels—the feudal system was in regular gradation—those duties which the sovereign demanded of the vassals of the crown, they again demanded of their own. Happily the right in the individual, to require that service, has ceased; yet the claim to a *national* militia still exists. In Scotland, that constitutional system of national defence subsisted at the Union. The parliament of Britain in 1709 voted, "that "her militia should be regulated as in England," which mode of internal defence, parliament has also declared 30 Geo. II. c. 25, "to be essentially necessary to the "safety, peace, and prosperity of England." Those unfortunate but political causes, through the operation of which Scotland was afterwards *disarmed*, are now at an end. Disaffection has been extinguished, and "the spirit of Ja-"cobitism has retired to seek repose in the grave." No part of the British dominions feels *now* stronger attachment to the House of Hanover, and to the constitution, than that country. Yet her claim to a *militia* has not been established, and her system of home defence, by means of *fencible regiments*, in time of war, (for in peace she has none) is far less *constitutional*.

* 20 Geo. II. c. 43. Although it may be admitted that the *nobility* saw with satisfaction the general advantage to the country

of Scotland were emancipated from ariſto-
cratical tyranny, or that the genial effects
of

country in that meaſure, which was undoubtedly a proper amendment of the treaty of *Union*, the author by no means intends to ſay, that the *peers* of Scotland had participated in *all* the advantages ariſing from that treaty. Their patriotic ſacrifice at that period was but ill requited. To accelerate the accompliſhment of the *Union*, they threw themſelves upon the future determination of the adminiſtration and parliament of Britain; and they have become a *ſoleciſm* in the Britiſh conſtitution, an hereditary order, ſitting, by a ſmall repreſentation, in an hereditary aſſembly and *inelective* eſtate of parliament. Nor is that repreſentation for *life*, but choſen into each parliament.

Had they, at the Union, demanded the right of election into the Houſe of Commons, while a *certain* number of their families had been declared *hereditary* peers of Great Britain, and to be filled up as they fell *vacant*, from the peerage, ſince all could not obtain that ſituation, it is ſubmitted, whether they would not now have ſtood in a much more flattering and reſpectable condition; and perhaps a *plan* ſomewhat ſimilar might ſtill be attended with ſucceſs.

Had this propoſal then taken place, it would, in the conſtitution of parliament, have been only a further re-
ſtriction

of the Union with England were completely eſtabliſhed. * At that auſpicious æra, thoſe barbarous chains which had checked induſtry, damped genius, and which were, in ſo many other reſpects, de-

ſtriction and limitation in the obligation or right of *perſonal* attendance. Was the plan juſt mentioned to be now adopted, the rights of the collateral heirs of ſucceſſion might be ſaved, by confining the Britiſh peerage to the *heirs-male* of the body of the perſons holding thoſe *titles* at the time they may be nominated; upon the demiſe of whoſe heirs-male, the Scottiſh peerage would again revive in the collateral ſucceſſion, and be again entitled to the chance of nomination into the Houſe of Peers. Was this rule adopted, it would follow, that thoſe peers of Scotland, who *have* already obtained an *hereditary* ſeat in the Houſe of Peers, would be removed from a competition in that *number*, while their *preſent* hereditary title exiſted; nor would the *prerogative* of the crown be reſtrained, in calling *others* of the peers of Scotland to the Houſe of Peers, independent of the nomination above mentioned.

* On this ſubject of the Union, ſee farther CUNNINGHAM's Hiſtory of Great Britain, lately publiſhed, in which a very intereſting account is given of the tranſactions of that period.

detrimental to the intereſts and even the morals * of the lower claſſes in Scotland, as well as dangerous to the ſtate, were ſhaken off. The feudal baron, in exchange for what ſerved only to feed his pride, became a partaker in all thoſe advantages which naturally flow from that general induſtry and improvement, which accompany a ſpirit of riſing freedom.--- Scotland, ſince that period, has improved rapidly, induſtry has increaſed, the public revenue has been greatly augmented, and ideas of conſtitutional liberty in general pervade the nation.

Had theſe changes taken place before the *Union* of the parliaments, and the peers of Scotland been ſeparated, as in England, into a different houſe from that of the commons, the queſtion concerning the

* The old cuſtom of levying black mail, an annual value given to ſecure your property from pillage, originated in the abuſe of feudal poſſeſſions.

the elegibility of their eldeſt ſons might not have remained, at this day, a ſubject of diſcuſſion. It is ſaid, that the firſt time the eldeſt ſons of peers were known to ſit in the Houſe of Commons in England, was in 1550, during the reign of Edward VI. when Sir Francis Ruſſel, who, by his brother's death, came to be preſumptive heir to his father Lord Ruſſel, created earl of Bedford, did not vacate his ſeat on that ſucceſſion.* This caſe is nearly ſimilar to the firſt inſtance which occurred in Scotland at a much later period, though it was differently and juſtly decided.

It was evident to the common ſenſe of the Engliſh nation, that the eldeſt ſons of peers, who did not ſit in parliament in perſon, could not, on the introduction of re-

 preſentation,

* See Wight, p. 272; Precedents of Proceedings in the Houſe of Commons by Mr. Hatſell, publiſhed in 1781, p. 10, 11, &c.

preſentation, in their parliamentary capacity be annihilated; and it was fortunate that thoſe principles of juſtice then prevailed, ſince they are thereby enabled to prepare, and to qualify themſelves to act with honour and propriety in thoſe ſituations which they are one day to fill. This claſs of citizens in England were not, as the ſame claſs was, at a later period in Scotland, objects of political jealouſy and intrigue. The minority of Edward the Sixth prevented the interference of the crown; and the diviſion of parliament into ſeparate houſes, had removed that jealouſy which might otherwiſe have been entertained of the peers by the commons. The right of the eldeſt ſons of peers to elect or be elected, in the character of Engliſh freeholders, was not ſuppoſed to be invalidated by the circumſtances, that no inſtance of their attempting to obtain a ſeat in parliament, had occurred ſooner than this which has

has juſt been quoted. Although repreſentation had been introduced in England, as early as the reign of Henry III. had it not been for the contingent event of ſucceſſion, a conſiderable time might even have elapſed after this period, before the ſons of her peers had been led to conſider a ſeat in the Houſe of Commons of that country, as an object of ſufficient importance to merit their attention.

If then, on the whole, we reaſon from the natural rights of mankind, from the originally free and equal conſtitution of Scotland, from the circumſtances which occaſioned the excluſion that is the ſubject of theſe obſervations, from that change of circumſtances which has taken place ſince, or from that which had ſo general and great an influence on the political conſtitution of Scotland in other inſtances: in a word, whether we reaſon from juſtice, political

litical expedience, or example, the claims of the eldeſt ſons of the peers of Scotland to parliamentary repreſentation will appear inconteſtible.

But it has been ſuggeſted, that in order to obtain the exerciſe of this right, an alteration muſt be made in the *articles* of the Union; and, in oppoſition to this, all the dangers have been diſplayed which the nation would have reaſon to apprehend from an infringement of that ſacred treaty. To thoſe who argue in this manner, without combating the general poſition, that it is the intereſt of Scotland to adhere ſtrictly to the terms of the Union, (for that has been artfully blended with this ſubject) the queſtion may be put, has the treaty of Union been invalidated by the abolition of the *heritable* juriſdictions? Or by different acts for regulating elections? Or by thoſe altering

altering the penalties of many crimes, (particularly treaſon, 7 Ann. c. 20) which, in Scotland, were not puniſhed in the ſame extent before the Union? Can it in reality be ſuppoſed, that the validity of this treaty may be endangered by the ſucceſsful iſſue of that ſpirit of reform now prevailing in both the ſhires and burghs of Scotland? Would the main and eſſential articles of the Union, on which the incorporation of the kingdoms depends, be thereby unhinged? Why, then, fear any evil from admitting a capability in the eldeſt ſons of the peers of Scotland to repreſent her ſhires and burghs in parliament? Again, would the national faith of England, *then* pledged to Scotland, be infringed? Would the eſtabliſhment of the preſbyterian form of church government be thereby affected? Or her participation in the commercial privileges of England? Or her proportion

portion of the land-tax, * even if her perſonal taxes and ſtamp duties ſhould be equalized

* If Scotland has any thing to dread from an alteration of the articles of the Union, it is in the land-tax. There is no inducement to injure her in any of the reſt; for motives of national improvement will mutually dictate in each kingdom the encouragement of induſtry. And, with regard to that important article, Scotland is guarded by the national faith of England; ſince it was with that article that ſhe compounded the *number* of her repreſentatives in parliament, but not the *manner* in which they were to be ſent. For, admit the latter, and you deſtroy the propoſed alteration in her laws of county elections, now univerſally declared neceſſary. The proviſion in the treaty of Union, on that head, is diſtinct and abſolute. By article 9th, it is provided, "That "while England pays a ſum, ſomewhat under two mil- "lions ſterling, annually, of land-tax, Scotland ſhall pay "forty-eight thouſand pounds ſterling, as ſuch." That is, while England pays four ſhillings in the pound, Scotland ſhall pay an eight month's ceſs. Now, while England ſhall continue to pay that ſum annually, Scotland will be aſſeſſed in that proportion; and if England ſhall pay but two ſhillings, or three ſhillings in the pound, Scotland will then pay only a four month's ceſs, or twenty-four thouſand pounds, or a ſix month's ceſs, being thirty-ſix thouſand pounds. If England, again, ſhall pay ſix, or more

equalized throughout Great Britain? No! No ſuch alarming conſequences can ſeriouſly be apprehended from the innovation in queſtion; if, indeed, to reſtore a body of men, reſpectable for their birth, their character, their poſſeſſions, and their proſpects, to the exerciſe of a right of which they have been injuriouſly deprived, can be properly called by ſo invidious a term. In whatever degree the Scotch may be tenacious of the Union articles, it is abſurd to ſuppoſe, that the removal of this diſqualification of the eldeſt ſons of the peers of Scotland, can be in any degree conſtrued into an infringement of that treaty; nor of the ſubſequent act, 5 Annæ, c. 8,

more ſhillings in the pound, Scotland will in like manner pay a twelve-month's ceſs, or more, and ſo on. But Scotland cannot be affected with any new internal regulations reſpecting that tax within England. It is the general ſum that ſhe has to regard, and it is in the annual alterations of that general ſum alone, that ſhe can in any meaſure be affected.

above mentioned, which is declared to be of equal validity with the articles of *Union*.

From that never-ceaſing fluctuation which conſtantly diverſifies the face of human affairs, it will always be a true maxim, that there are more caſes than laws. Not only have men of ſpeculation found it impoſſible to frame a model of government equally adapted to all mankind, but the laws of the ſame nations neceſſarily change with their changing characters and circumſtances. Were no alterations practicable in the treaty of Union, it would, in time, become a confuſed and unwieldy maſs, and fall to pieces from its inconſiſtency. Yet any alteration is only to be made with *general* conſent.

If no ſuch thing as a poſſibility of alteration in the conſtitutional ſyſtem of Scotland was foreſeen and ſuppoſed at the Union, where was the ſenſe and meaning of the 4th, the

the 18th, and the 25th articles of that treaty? The truth is, by the Union, the government of Scotland was to ſink into that of England. The two kingdoms were to be inſeparable, and for ever joined. The principles of that conſtitution which had deviated leaſt from its original baſis, and which was moſt congenial to the rights of mankind, were to be the leading features in the Britiſh government. And, it cannot be ſuppoſed, that by a treaty framed after ſuch a model, the firſt rights of that conſtitution were to be refuſed to the eldeſt ſons alone of the peers of Scotland.

It is provided by the 4th article of the treaty of Union, " That all the ſubjects " of the united kingdoms of Great Britain " ſhall, from and after the Union, have " full freedom and intercourſe of trade " and navigation, to and from any part

" or place within the ſaid united king-
" dom, and the dominions and planta-
" tions thereunto belonging; and that
" there be a communication of all *rights*,
" *privileges, and advantages*, which do or
" may belong to the ſubjects of either
" kingdom, except where it is otherwiſe
" expreſsly agreed in theſe articles."

By the 18th article, " That the laws
" concerning the regulation of trade, cuſ-
" toms and exciſe, to which Scotland, by
" virtue of this treaty, is to be liable, ſhall
" be the ſame in Scotland, from and after
" the Union, as in England; and that *all*
" *other laws* in uſe within the kingdom of
" Scotland, do after the Union, and not-
" withſtanding thereof, remain in the ſame
" force as before, (except ſuch as are con-
" trary to, or inconſiſtent with this treaty)
" but *alterable* by the parliament of Great
" Britain, with this difference betwixt

" the

" the laws concerning public right, poli-
" cy, and civil government, and thoſe
" which concern private right; that the
" laws which concern *public right, policy*
" *and civil government*, may be made the
" ſame throughout the whole united king-
" dom, but that no alteration be made in
" laws which concern private right, *ex-*
" *cept for evident utility of the ſubjects within*
" *Scotland*."

And, by article 25th, " That all laws
" and ſtatutes in either kingdom, ſo far
" as they are contrary to, or inconſiſtent
" with the terms of theſe articles, or any
" of them, ſhall, from and after the Union,
" ceaſe and become void, and ſhall be ſo
" declared to be, by the reſpective parlia-
" ments of both kingdoms."

The rights of ſitting in parliament and voting at elections, are *public* rights, and cannot

cannot be poſſeſſed by an individual, but in virtue of a *public* poſſeſſion, to the extent required by law for theſe purpoſes. He may alienate that extent, and, in conſequence of his alienation, another may be entitled to enter a claim for the poſſeſſion of thoſe rights. But he cannot alienate that extent and retain thoſe rights. Neither can he convey *directly* to another thoſe rights, even along with the extent.*

The rules which regard the qualification of election, therefore, evidently appear to fall under the articles that have been quoted of the Union, in as much as they are *public* rules, and do not encroach in any degree on the *private* laws of the kingdom;

* The conveyances on confidential votes, all bear an appearance of the granter having denuded himſelf of thoſe rights; which, a *bare* right of ſuperiority being ſufficient, is eaſily done, at the ſame time that the eſſentially valuable right of property may be retained by means of a diſpoſition of the eſtate in *feu*.

kingdom; and the right of the eldeſt ſons of the peers of Scotland to repreſent from that country in parliament being alſo a *public* right, falls undoubtedly within the proviſions of theſe articles, and under thoſe laws which concern *public right, policy, and civil government.*

Were the diſqualification of the eldeſt ſons of peers, which depends ſolely on a reſolution of parliament, removed, what *private* law of Scotland would be thereby altered or affected? What private injury ſuſtained? What individual could ſtate damages? Had their ineligibility been even enforced by a *ſtatute* of the Scottiſh parliament, it is alſo removable in terms of thoſe articles of the treaty of Union above mentioned, without *infringing*, in the ſmalleſt degree, on that treaty, where it is expreſsly provided, that the *laws* which concern public rights, policy, and civil government,

vernment under which it has been already ſhewn that their diſqualification falls, may be made the ſame in both kingdoms; and were the rights of *electors* of a private nature, even thoſe laws which concern private right, may, in virtue of that treaty, be altered by the parliament of Britain, when for the utility of Scotland.

Again, the diſqualification of the eldeſt ſons of Scotch peers to elect or be elected to parliament, very materially affects thoſe *equalities* ſo ſtrongly provided for in the 4th article of the Union: for the argument upon which the counſel for the freeholders laid the greateſt ſtreſs in 1708, the dangerous influence of the peers of Scotland on the elections from that country, would not have diſqualified the eldeſt ſons of the peers of England, whoſe fathers did not poſſeſs property in Scotland, and who not only act as repreſentatives of the

people

people in that country, but who may alſo be choſen for Scotland; while the eldeſt ſons of Scotch peers can ſit in parliament only for England.* Nor can the eldeſt

 ſons

* In former times, the Attorney and Solicitor General in England were ineligible to the Houſe of Commons, becauſe they ſat in the Houſe of Peers to give their opinions on points of law. Blackſtone, vol. i. p. 168; Hatſell, p. 16; Wight, p. 292. Their attendance there has now ceaſed, and they are eligible to the Houſe of Commons. In the ſame ſpirit of equality that is here contended for, the Lord Advocate may be elected, who is Attorney General for Scotland.

Previous to the *Union*, not only the eldeſt ſons, but the peers of Scotland themſelves, as they may ſtill do in Ireland, ſat in the Houſe of Commons of England; Lord Dyſart, who had in 1705 refuſed an offer of an *Engliſh* peerage, and Lord Falkland, both vacated their ſeats at that period, having become *peers* of Great Britain. Thoſe of the peers of Scotland, who are not of the *ſixteen*, may have thereby loſt ſome privileges in conſequence of the Union, but their eldeſt ſons cannot have acquired any, by retaining a *right* which they formerly enjoyed; nor can their right of ſitting in parliament for England enter into the ſcale of *equalities* ariſing from the *Union*.

ſons of Scotch peers be now conſidered as repreſented by their fathers, ſince even the peers ſit in parliament only by repreſentation, and ſince no perſon can properly be repreſented but he who enjoys the *privilege* of electing.

Injured by a deprivation of thoſe *equalities*, they may, inconteſtibly, demand to be reſtored to their undoubted privilege and right. But not only are the eldeſt ſons of the peers of Scotland injured in reſpect to thoſe equalities, and that mutual participation of privileges provided by the 4th article of the Union to the inhabitants of both kingdoms: they are alſo marked out as a diſtinct and ſeparate body of ſubjects, to whom *alone* the rights and privileges of Britons are refuſed. If they are charged with a crime, they are tried by commoners. They cannot even demand a jury compoſed of the eldeſt ſons

of

of peers, being in every reſpect, during the lives of their fathers, in the eye of law, commoners; for the Britiſh conſtitution knows no diſtinction of ſubjects between *peers* and *commons*. They are, at the ſame time, the only body of Britiſh ſubjects who, without either holding public offices or lying under any diſqualifying ſentence by ſtatute, are poſitively incapacitated from electing or being elected to parliament, from the place of their nativity; from that part of the united kingdom in which their property is ſituated, and with whoſe local intereſts they are beſt acquainted. The immediate heirs of great landed eſtates and parliamentary importance, and who may one day become members of the ſupreme judicatory of the empire, are, in Scotland, debarred from the beſt opportunities of acquiring a knowledge of the Britiſh conſtitution. In their native country, they are no more than ſpec-

tators of the firſt and moſt valuable privileges of Britons. No legal poſſeſſion of property to any extent, can entitle them to the rights of their fellow citizens. There is no ſituation that can enable them to defeat or elude that political diſqualification, while, in the courſe of fortuitous events, individuals, without being doomed to that act of injuſtice by their birth, may be ſubjected to it from ſucceſſion.*

Upon

* Two inſtances of a latitude in the explanation of that diſqualification of the eldeſt ſons of the peers of Scotland have occurred ſince the Union.

In 1720, William Lord Strathnaver, eldeſt ſon of the Earl of Sutherland, predeceaſed his father, and left a ſon, William. In 1724, this William, then calling himſelf Lord Strathnaver, was elected to repreſent the county of Sutherland, and his right to ſit in parliament was aſcertained in reſpect that the diſqualification of peers eldeſt ſons was *exceptio ſtricti juris*. He continued to repreſent that county until 1733, when, on the death of his grandfather, he became Earl of Sutherland. In what reſpect can an eldeſt ſon, born in lawful wedlock, on the death of his father, *ad pacem et fidem regis*, be conſidered in point of public right

or

Upon the whole, it appears, that by the original conſtitution of the Scottiſh parliament,

or privilege, in a different ſituation from his father? It is an eſtabliſhed maxim in law, that the heir is conſidered as in the ſame ſituation with the deceaſed, and bound to encounter the whole conſequences of that ſituation. *Hæres eſt eadem perſona cum defuncto.* On what principle is the determination of the Houſe of Commons, in the caſe of Lord Strathnaver, to be accounted for, or explained? It cannot have been affected by the peculiarity in the county of Sutherland above-mentioned, of *vaſſals* enjoying the right of voting; and it is but fair to ſuppoſe, that their opinion was founded upon more liberal grounds than merely, that in the reſolutions diſqualifying the eldeſt ſons of peers, the *grandſons* of peers had not been expreſsly inſerted.

William Marquis of Tullibardin, was attainted in 1715. His father, John Duke of Athol, obtained an act of parliament in 1716, conveying the honours of Athol to James his ſecond ſon, who was member for Perthſhire, at his father's death in 1724, when he became Duke of Athol. His brother William lived many years after. *Douglas's Peerage of Scotland, titles of Athol and Sutherland.* And again, the forfeiture of the father has removed the diſqualification of the eldeſt ſon. General Fraſer, eldeſt ſon of

the

liament, all tenants, in *capite*, of the crown, were bound to give perſonal attendance in parliament; that thoſe acts of the legiſlature which firſt diſpenſed with the perſonal attendance of the ſmaller freeholders in Scotland did not diſqualify them from attending, but relieved them from the obligation of doing ſo, on condition of their ſending repreſentatives; that thoſe acts of parliament reſpecting the right of voting at their elections, which were paſſed after the eſtabliſhment of parliamentary repreſentation, and the introduction of *perſonal* titles of peerage confirming HEREDITARY ſeats in parliament, with reſpect to the *eldeſt ſons* of peers, are ſilent; and particularly, that the act 1661, c. 35, excepts only the *great barons* or *peers*, who had not been diſqualified

the late Lord Lovat, repreſented the county of Inverneſs in parliament, from 1768 to his death in 1782, when he was ſucceeded in that repreſentation by his brother, the Hon. Archibald Fraſer of Lovat.

qualified by any former act, from voting at elections, and who, ſitting *perſonally* in parliament, were equally *incapable* of electing or of being elected. It appears alſo, that the reſolutions of 1685, 1689, and 1708, diſqualifying the eldeſt ſons of peers, were paſſed upon grounds wholly foreign from thoſe of legality and juſtice, which, indeed, do not appear to have been taken into conſideration; that their diſqualification was not eſtabliſhed at the *Union*, but, on the contrary, their right of parliamentary repreſentation *poſitively* maintained, ſince no *ſtatutory bar* exiſted againſt them, and they were formerly bound, when tenants in *chief*, to give perſonal attendance in parliament.

The introduction of repreſentation cannot have annihilated their parliamentary rights and importance, which cannot be deſtroyed (for in juſtice they could not be taken

taken away) without a poſitive ſtatute. Even if ſuch an arbitrary ſtatute had been enacted by parliament, it might by another act of parliament be reverſed; but much more eaſily may their *elective* capacity be reſtored when no ſuch ſtatute exiſts. The evil tendency of the cauſes on which the reſolutions ſetting aſide the eldeſt ſons of Scotch peers in elections were enforced, have happily ceaſed to take place: and the abolition of the *heritable* juriſdictions in Scotland, muſt have completely removed that jealouſy of ariſtocratical influence which formerly prevailed, perhaps not without reaſon, in that country. The eldeſt ſons of the Scotch peers, therefore, entertaining a firm confidence in the juſtice of the Houſe of Commons, to whoſe determination the point in queſtion, the merits of which are yet untouched and entire, was left at the Union, have reaſon to expect that they will reverſe the diſqualifying reſolutions

above

above ſtated, and reſtore them to the exerciſe of thoſe rights, which in the character of *tenants* of the crown they formerly enjoyed, and to which they are now entitled as Britiſh citizens and ſubjects.

As the eldeſt ſons of the Scottiſh peers were deprived of a valuable privilege, by a reſolution of the Houſe of Commons in 1708, ſo the peers themſelves were not only marked out by a reſolution of the Houſe of Lords in 1711, as the only order of men within the empire, on whom the ſovereign could not confer the higheſt mark of his royal favour, the *dignity* of the Britiſh peerage, and of an hereditary ſeat in the legiſlative aſſembly of the nation, but the undiſputed *prerogative* of the crown was alſo moſt unjuſtly infringed.* Every peer of England was ca-

* Nor was this the only hardſhip that was impoſed on the peers of Scotland, in conſequence of the *Union*. They were

pable of being raiſed to a higher degree of rank: every commoner in Britain was capable of being ennobled, or, if duly qualified, of repreſenting his countrymen in the Houſe of Commons. But the peers of Scotland were to remain for ever in the ſame ſituation in which they ſtood at the Union, and their eldeſt ſons were to be incapable of repreſenting either the counties, or burghs of that country in parliament. Such were to be the rewards of their yielding up their privileges, and their honourable and independent ſituations, at the ſhrine of the *national* welfare!

and

They were to meet at their elections without a *preſes*; and, on an equality of votes, they had not the means of determining them: they were not to poſſeſs an open *record* of their proceedings: they were not at theſe meetings to queſtion the right of any perſon to the *title* upon which he claimed as a peer to vote, nor to arraign, except by an *ineffectual* proteſt, the diſqualifications of voters, however apparent; and a baneful *premunire* was extended over their conduct when aſſembled at the elections.

and ſuch the returns to that patriotic ſacrifice, without which, Scotland might have ſtill laboured under ariſtocratical tyranny, and England have been thrown, on manifold occaſions, into a ſtate of danger and confuſion!

But a ſentence founded in the paroxyſm of political jealouſy, could not ſupport itſelf for ever under the eye of judges ſo highly diſtinguiſhed by a ſpirit of juſtice and honour, as the Britiſh Houſe of Peers; and the capability of the Scottiſh of being inveſted with the dignity of the Britiſh peerage, has been lately acknowledged and aſcertained.* This indeed was a brilliant

 inſtance,

* It is to be obſerved, at the ſame time, that no inſtance has as yet occurred, of a peer of Great Britain being created from a *barony* ſituated within Scotland: though this undoubtedly would not be unconſtitutional or illegal, as the kingdoms of England and Scotland, in virtue of the Union, now form equally *one* kingdom, that of Great Britain. Yet the impeachment of Warren Haſtings, Eſq. is now carried on in name of the *commons* of England only.

inſtance, and a natural effect of that progreſſive ſpirit of candour, liberality, general accuracy, and improvement which happily diſtinguiſh the eighteenth century, but in no nation on earth more than in Britain. It was the ſame elevated ſpirit of juſtice and reaſon that aboliſhed, in Scotland, the privy-council, and thoſe remnants of oppreſſion, the hereditary juriſdictions; and which, in Britain, eſtabliſhed the judges in their offices during good behaviour and for life.* This great and generous principle has not yet ſpent its force. It will ſtill be extended to the juſt demands of both ſhires and burghs now before parliament, from Scotland. And as the injuſtice that was done to the eldeſt ſons of the peers of that country, when they were interdicted from their

poſitive

* A complaint in the claim of right from Scotland at the Revolution againſt the government of king James, exhibits his having changed the commiſſions of the judges *ad vitam aut culpam*, into commiſſions *durante bene placito*.

poſitive right of parliamentary repreſentation, was not leſs than that which was done to the peers themſelves, when they were held incapable of receiving whatever *mark of favour the free will of the ſovereign might beſtow:* the remedy, it is to be hoped, though ſomewhat later, will not be *leſs* effectual.

It was but the other day that the peers of Scotland, not of the ſixteen, or their ſons, were included in the *order* of admiſſion within the *body* of the Houſe of Lords. Was it becauſe they were *incligible* to the Houſe of Commons that they were admitted? Was that the reaſon why the noble mover of the motion would not at firſt extend its effects to their ſons? Or is that the reaſon why the ſons of the peers of England are admitted within the body of *that houſe?*

If

If the ſame influence which annihilated in Scotland the parliamentary conſequence of the ſmall proprietors, on the queſtion that forms the ſubject of theſe obſervations, ſhall ſtill ſway the *voice* of her commiſſioners in the Houſe of Commons; if they ſhall ſay,

——*Quis te juvenem, confidentiſſime*, noſtras,
Juſſit adire domos? *Quidve hinc petis?*——

that diſadvantage, it may reaſonably be preſumed, will be more than counterbalanced to the *eldeſt ſons* of her peers, by the prevailing numbers, and the free and liberal genius of the Engliſh.

AP-

APPENDIX.

No. I.

Part of a Letter from Thomas Randolph to Sir William Cecil, dated Auguſt 10, 1560.

THE barons, who, in time paſt, have been of the parliament, had yeſterday a convention among themſelves in the church, in very honeſt and quiet ſort. They thought it good to require to be reſtored unto their ancient liberty, to have voice in parliament. They preſented that day a bill unto the Lords unto that effect, a copy whereof ſhall be ſent as ſoon as it can be had. It was anſwered unto gently, and

and taken in good part. It was referred unto the Lords of the Articles, when they are choſen, to reſolve thereupon.

Petition of the Leſſer Barons to the Parliament held in Auguſt 1560, *tranſmitted by Thomas Randolph to Sir William Cecil, in his letter of the* 15*th of that month.*

My Lords, unto your Lordſhips humbly means and ſhows, we the barons and freeholders of this realm, your brethren in Chriſt, that, whereas the cauſes of true religion, and common well of this realm, are, in this preſent parliament, to be treated, ordered, and eſtabliſhed, to the glory of God, and maintainance of the commonwealth, and we being the greateſt number, in portion, where the ſaid cauſes concern, and has been, and yet are, ready to bear the

the greateſt part of the charges thereuntill, as well in peace as in war, both with our bodies and with our goods, and ſeeing there is no place where we may do better ſervice now than in general councils and parliaments, in giving our beſt advice and reaſon, vote and counſel, for the furtherance thereof, for the maintainance of virtue, and puniſhment of vice, as uſe and cuſtom had been of old, by ancient acts of parliament, obſerved in this realm, whereby we underſtand, that we ought to be heard to reaſon and vote in all caſes concerning the commonwealth, as well in councils as in parliaments, otherwiſe, we think, that whatſomever ordinances and ſtatutes be made concerning us, and our eſtate, we not being required and ſuffered to reaſon and vote at the making thereof, that the ſame ſhould not oblige us to ſtand thereto: therefore it will pleaſe your Lordſhips to take conſideration thereof, and of

the charge born, and to be born, by us, ſince we are willing to ſerve truly to the common well of this realm, after our eſtate, that ye will, in this preſent parliament, and all councils where the common well of the realm is to be treated, take our advice, counſel, and vote, ſo that, without the ſame, your Lordſhips would ſuffer nothing to be paſſed and concluded in parliament, or councils aforeſaid, and that all acts of parliament made, in times paſt, concerning us, for our place and eſtate, and in our favour, be at this preſent parliament confirmed, approved, and ratified, and act of parliament made thereupon: and your Lordſhips anſwer humbly beſeeches.

Of the ſucceſs of this petition, the following account is given by Randolph, in a letter to Cecil, dated Auguſt 19, 1560. "The matters concluded and paſt, by common conſent, on Saturday laſt, in ſuch ſolemn

ſolemn ſort as the firſt day that they aſſembled, are theſe: Firſt, That the barons, according to an old act of parliament made in the time of James I. in the year of God 1427, ſhall have free voice in parliament. This act paſſed without any contradiction."

No. II.

The Names of the LL. and Burgeſſes of the Parliament held in Scotland in Auguſt 1560.*

JAMES Duke off Chaſtellerault; James Erle off Arran; Archibald Erle of Ergyle; Jhon Erle off Athole; William Erle *Marſchal*; David Erle Crawfurd; James Erle Mortoun; Alexander Erle *off Glencarne*; Andro Erle off Rothes; Hew Erle off Eglintoun; Gilbert Erle off Caſſilis; Jhon Erle off Sutherland; George Erle off Caithneſs; Jhon Erle off Menteith; Jhon Archibiſchop off Sanct Andr; Commendatare

* This parliament is not taken notice of in the public records; but the roll here given is taken from the Cotton Library; and the title is of the hand-writing of Secretary Cecil. See *Keith's Hiſtory*, *p.* 146.

Commendatare off Paſlay; Robert Biſchop off Dunkeld; William Biſchop off Dumblane; James Biſchop off Ergyle; Alexander Archibiſchop off Athenis, Elect off Galloway, and Commendatare off Inchaffray; John Elect off the Ilis, Commendatare off Ycolmkyl and Archattane.

George Lord Gordoun; Jhon Lord Erſkyn; Patrik Lord Ruthven; Alexander Lord Home; Jhon *Lord Lyndeſay* off the Byris; William Lord Hay off Zeſtir; James *Lord Somerville*; William Lord Levingſtown; Andro Lord Stewart off Ouchiltre; Alexander Lord Saltoun; Robert Lord Boyd; Robert Lord Elphinſtoun; Jhon Lord Innermeith; Patrick Lord Gray; James Lord Ogylvie; Jhon Lord Glamis; Jhon Lord Borthuick: Allane LordCathcart; James Lord Sanct Johnis.

James

James Commendatare off the Priorie off Sanct Andros and Pettinweme; Jhon Commendatare off Abirbrothok; Robert Commendatare off Halyrudhows; Jhon Commendatare off Coldinghame; Jhon Abbot off Lundoris; Donald Abbot off Couper; Andro Commendatare off Jedburgh and Reſtenot; Marke Commendatare off Newbottle; Adam Commendatare off Dundrannen; Jhon Abbot off New Abbey; Commendatare off Dryburgh and Inchmahome; Poſtulat off Cambuſkyneth; James Commendatare off Sanct Colmis Inche; William Commendatare off Culroſs; Walter Abbot off Kinloſs; Gawine Commendatare off Kilwynnyng; Nichol Abbot off Ferne; Robert Commendatare off Deir; Jhon Priour off Portmoak; Robert Commendatare off Sanct Marie Iſle; Robert Miniſter off Faulfurde.

The

The commiſſaries off burrois, viz. Edinburgh, Striveling, Perth, Abirdene, Dundee, Air, Irwein, Hadingtown, Lynlythgow, Glaſgow, Peblis, Jedburgh, Selkirk, Coupar, Kingorne, Banff, Forfar, Invernes, Montroſs, Kircudbricht, Wigtoun, Innerkeithing.

Williame Maiſter *Merſcheal*; Jhon Maiſter off Maxwel off Terriglis, Knycht; Patrik Maiſter *Lindeſay*; Henry Maiſter Sinclare; William Maiſter off *Glencarne*; Hew Maiſter *Somervile*; James Dowglas off Drumlangrig, Knycht; Jhon Gordoun off Lochinver; Alexander Stuart off Garleiſs; Jhon Wallace off Cragye; William Cwninghame off Cwninghameheid; Jhon Cwinghame off Caprintoun; Jhon Mwre off Rowallane; Patrick Howſtoun off that Ilk; George Buquhannane off that Ilk; Robert Menteith off Kerſs; James Striveling off Keir; William Murray off Tullibardin;

Tullibardin; Andro Murray off Balwarde; Jhon Wiſheart off Pitarro; Williame Douglas off Lochlevin; Colin Campbell off Glenurquhard; Williame Sinclare off Roſsling; Jhon Creichtoun off Stratharde; Alexander Irwein off Drum; Allardes off that Ilk; Alexander Fraſer off Philorth; Williame Innes of that Ilk; Sutherland off Duffus; Jhon Grant off Freuchy; Robert Monro off Fowlis, George Ogylvie off Dunlugus; David Ogylvie off that Ilk; Jhon Ogylvie off Innerquharite; Ogylvie off Cloway; Ouchterlony off Kelly; Jhon Straithauchin off Thorntoun; Andro Straton off Lawrieſtoun; Jhon Creichtoun off Ruthvennis; Thomas Blair off Baltheock; Ogylvie off Inchemertyn; Thomas Mawle off Panmure; Archibald Douglas off Glenbarve, Thomas Fottringhame off Powry; Robert Grahame off Morphy; Robert Stewart off Roſſyth; Walter Lundy off that

that Ilk; Myreton off Cammo; Arthure Forbes off Reres; Andro Wod off Largo; Jhon Kynneir off that Ilk; Jhon Edmeſton off that Ilk, zounger; Gilbert Wauchope off Niddrie Merſcheal; George Home off Spot; Hamiltoun off Innerweik; David Home off Wedderburne;

Nisbet off that Ilk; Jhon Swintoun off that Ilk; William Hamiltoun off Sanchar; George Crawfurde off Leſſures; James Cockburne off Scraling; Twedy off Drumelzear; Hew Wallace off Carnel; Robert Lyndeſay off Dunrod; Robert Maxwell off Calderwood; Patrik Lermonth off Derſy; Jhon Carmichael off that Ilk; Jhon Carmichael off Medowflat; George Haliburton off Petcur; James Haring off Glaſclune; Stewart off Grantuly; Jhon Stewart off Arntully; James Meinzeis off that Ilk; Jhon Forrel off that Ilk; Maiſter Alexander Levingſtoun off Donipace; Jhon Cwninghame off Drumquhaſſil; David Hamiltoun off

 Fingaltoun;

Fingaltoun; Henry Wardlaw off Torry; Ramſay off Banff; James Heriot off Trabron; Walter Kerr off Ceſfurde; John Kerr off Phernihurſt; Jhon Johnſtoun off that Ilk; Williame Dowglas off Quittinghame; Neil Montgomery off Langſchaw; Patrik Montgomery off Giffine; Montgomery off Heſil-heid; Williame Cranſtoune off that Ilk; Thomas Macdowal off Makcarſton; Jhon Home off Coldingknowis; Patrik Hepburne off Wauchtoun; James Foreſtar off Corſtorphin; Jhon Sandilandis off Caulder; William Lauder off Haltoun; Jhon Cockburne off Ormeſtoun; George Brown of Colſtoun; James Sandelandis off Cruvy; Baillie of Lamyngtoun; Sir James Hamiltoun off Crawfurde; Jhon Knycht ; Arbuthnot off that Ilk.

To theſe names are ſubjoined, by the perſon who ſent the liſt to Secretary Cecil, the

the following words: 'With mony uthe-
'ris, baronis, freholdris, and landit men,
'but (i. e. without) all armour.' *

* See Mr. Wright's Appendix, No. XII. containing a record of the parliament 1579, where the Earl Marifhall and others appear by their procurators, *commoners*. After 1587, peers could only hold the *proxies* of peers. See act of parliament, 1617, c. 7, p. 37. *Peers* are alfo held to be incapacitated from following the profeffion of the *bar*; that is to fay, they demand the privilege of *pleading* covered, and, in like manner as the *king's counfel*, within the bar of the court; but which, at leaft in Scotland, it is faid, would be refufed to them. If, however, this privilege, which is claimed by the peers, be an eftablifhed privilege of peerage, no court of law can be entitled to withhold it. If this privilege is *not* eftablifhed, ought the peers to demand it? Ought they to forfeit the advantages of an honourable profeffion on that ground? In whichever ftate this point may reft, the profeffion of the *bar*, which in this country is the direct road to the higheft *honours* and preferment, is an object of great importance to thofe, at leaft, who do not poffefs an abfolute and hereditary right of *fitting* in the fupreme council of the nation. Although no inftance of a peer having followed this profeffion may be given, would the courts of law be injured by this alteration? And is it even poffible, that this chief glory and boaft of the *Roman*, can be deemed improper, or illegal in the *Britifh fenator?*

No. III. p. 23, p. 27.

IN former times, all cauſes, whether civil or criminal, were tried in Scotland by jury, which, indeed, ſeems to have been a principle inherent in the feudal ſyſtem.* The mode of trial by juries was eſtabliſhed not only in the king's courts, but alſo in thoſe of his vaſſals within their reſpective baronies. By degrees the king in his court, and the barons in theirs, aſſumed the power of determining the actions brought before them, without the aſſiſtance or advice of their vaſſals. The conſequences that were to be apprehended from this practice, having eſcaped the attention of the people, actually took place. Juries in civil cauſes were wholly laid aſide in

* Trial by *jury* might perhaps be traced to a more remote period, in the *original* connection between the inhabitants of the eaſt coaſt and low country of Scotland, and thoſe of the *north rn* parts of Europe. See Mr. Miller's Account of the Saxon Government.

in both courts, and judges *ordinary* having been appointed in each jurisdiction, it has at length been established that their judgment is alone, and exclusively decisive; the baron, or feudal proprietor, having been prohibited from judging in his court in person, by 1747, c. 43.

The jurisdiction of the king's court underwent various changes. The power of the justiciar to judge in civil actions was, at one time, vested in the king's council; afterwards, in a committee of parliament called the session; which, at last, in the reign of James V. was established upon the model of the parliament of Paris, into the form, a few subsequent alterations excepted, which it now wears.* The king still retained his right of judging in that court:

* The number of the judges in that court, *fifteen*, with the power of *appeal* to the parliament of Scotland formerly, and now to the House of Lords, may, perhaps, in a very great degree, have indemnified the nation in her loss of juries in *civil* actions.

court: for, in the reign of James VI. that monarch, having, as heir to Archibald Earl of Angus, laid claim to the Earl's eſtate, was declared by the Court of Seſſion to have a right of pronouncing ſentence on the import of his own claim: and a ſimilar power by 1681, c. 18, was renewed to Charles II. * This act alſo confirmed to the crown the right of a *cumulative* juriſdiction, which being complained of by the parliament at the Revolution, the act was repealed by 1690, c. 28.

In criminal offences, again, the office of coroner or crowner was of antient date in Scotland: and the form of inquiry into the fact by preſentment and indictment by a grand jury, ſeems alſo to have been eſtabliſhed.

* Erſkine's Hiſt. of the Law of Scotland, p. 35, tit. 3. Craig de Feud. lib. 3. dif. 7. c. 12. For a particular hiſtory of the powers of the Court of Seſſion, ſee Stuart's Obſervations on the Public Law of Scotland.

tabliſhed. Various alterations have likewiſe taken place, in that country, in the forms of the criminal law, and different commiſſions have been appointed for that purpoſe. The act of parliament 1587, c. 82, provides that juſtice eyres ſhall be held regularly over the kingdom twice in the year, when the criminals are to be tried by an aſſize. That act further appoints a commiſſion, conſiſting, in each county, of a " fixed number of honourable and wor-
" thy perſons, being knawen of honeſt
" fame, and eſteemed nae maintainers of
" evil or oppreſſion, and, in degree, earls,
" lords, baronnes, knights, and ſpecial
" gentlemen landed; quhilk ſall be the
" king's commiſſioners and juſtices in the
" furtherance of peace, juſtice, and quiet-
" neſs; together with four of the council
" of every burgh, within the ſelfe; quhilk
" ſall be conſtant and continual up-
" takers of dittay (an inquiry into the
" treſpaſs)

" treſpaſs) giveand, grantand, and com-
" mittand unto them, full power to take
" inquiſition, and make dittay by their
" own knowledge; or by *an ſworn inqueſt*,
" i. e. jury, or ſworn particular men, of all
" perſons ſuſpected capable of the crimes
" and defaults contained in the tables, to
" be made by the treaſurer, juſtice-clerk,
" and advocate, annexed to the preſent
" act divided in twa ſorts, &c." And theſe commiſſioners are further ordered to give in the treſpaſſors of the firſt liſt, or higher crimes, to the *crowner* of the ſhire, *to be* put upon trial at the next juſtice eyre; and to meet at the head-burgh of the ſhire, four times in the year, when *they* are authorized to try and judge the offenders of the ſecond or inferior liſt of crimes, with power to iſſue their precepts to the ſheriffs to ſummon *aſſizes*, &c.

At preſent, the ſheriffs of the counties, and the juſtices of the peace in the neighbourhood,

bourhood, are in the uſe and practice of inquiring into the fact, and taking declarations without the aſſiſtance of an inqueſt or jury, upon the perpetration of any of the higher liſt of crimes, and tranſmitting that inquiry or precognition to the Lord Advocate, or his deputies, of which he has three, and who, with the Solicitor General of Scotland, alone determine concerning the propriety of bringing the party accuſed to trial. The grand jury is entirely laid aſide; and all criminal proſecutions are carried on at the ſuit and expence of the crown. The Lord Advocate is the Attorney General of Scotland; and, his power, in all criminal caſes whatever, is ſimilar to that exerciſed by the Attorney General in England in informations *ex officio*. He may ſuffer the guilty to eſcape, and, under a pretence of juſtice, he may harraſs the innocent. He is under no obligation to bring any accuſation to a trial. He is liable

to no penalty if he declines to profecute any perſon ſuſpected of a crime, however ſtrong the preſumption of his guilt. He may find a precognition juſtifiable of trial in one inſtance, and not in another, though perfectly ſimilar: he can detain the party accuſed in confinement, and, upon the eve of a trial, deſert the diet either pro *loco et tempore*, or wholly; and, all this without aſſigning any reaſon whatever for his conduct. Nor can this powerful dictator be ſued for wrongeous impriſonment. The party accuſed, however, has the form of criminal letters, a ſpecies of *habeas corpus*, by which it is in his power to bring on his trial, when he has reaſon to apprehend that his confinement will be lengthened by a deſertion of the diet or trial *pro loco et tempore*

By the law of England, the bill of indictment expreſſes the degree of culpability

lity which the priſoner has incurred in the *act of killing*. The jury have the right of finding, or determining concerning the exiſtence of that degree of culpability; and, if he has only committed man-ſlaughter, he will not be found guilty of murder. But in Scotland, the diſtinction which formerly took place in thoſe crimes, ceaſed in conſeqnence of the act 1661, c. 22. And there is no legal diſtinction remaining between culpable homicide, *i. e.* man-ſlaughter, and murder. Both crimes are indicted in that country as murder; and, the jury, when they ſee that the crime charged, actually amounts to murder, find *guilty* or *proven*. But when the act of *killing* appears not to have proceeded from *forethought intention*, but *of a ſudden*, and that the crime which has been committed amounts only to *homicide*, the jury are under the neceſſity of finding *not proven*. As

the libel or charge makes no diſtinction in the crimes, the jury are unwilling to truſt the judgment on their verdict in the breaſt of the court; and chuſe rather to ſuffer an offence againſt ſociety to eſcape unpuniſhed, than to riſk the *life* of the priſoner on the humanity of the judge. And that would inevitably be endangered by their finding the libel *proven*, the charge always concluding for the puniſhment inflicted on the crime of murder.

But, ought not the charge or libel to expreſs the degree of criminality for which the priſoner is arraigned? And might not that privilege of determination and diſtinction in accuſations of murder, and culpable homicide, be reſtored to juries in Scotland by act of parliament, without prejudice to the dignity of her judges, or to the vindication of that infringement of the

the laws of ſociety which is occaſioned by the crime of man-ſlaughter.*

Many

* The want of diſtinction in the criminal law between murder and culpable homicide, was lately corrected by the court in the following inſtance: In the libel at the inſtance of "John and William Stewarts, againſt lieute-"nant George Storey, for the *murder* of William Stew-"art, ſurgeon, in Paiſley, the jury conform to the *re-"commendation* of the court, returned the following ver-"dict: "All in one voice find the pannell, George Sto-"rey, *not* guilty of the *murder libelled,* but at the ſame "time find him *guilty of culpable homicide.*" He was accordingly fined, and impriſoned for ſome months. Records of Juſticiary, January 1785.

It is reſpectable to find the judges of a country expreſs an anxiety for the ſecurity and liberty of the ſubjects, and the due adminiſtration of the laws. Thoſe ſentiments were in the above trial eſtabliſhed, and it is an inſtance in an enlightened age. Still, however, the opinions of mankind are fluctuating, and the *evil* of the criminal law, in correction of which, the recommendation from the court above-mentioned was at the time given, ought not to depend upon the fluctuation of opinion, or the direction of a judge, when the direct avowal of that *faculty of juries* can be eſtabliſhed, and reſtored to them by act of parliament. Thoſe acquainted with the hiſtory of the crimi-

nal

Many other offences are tried, and heavy punishments inflicted in Scotland, without the form of a jury: nor has the prisoner, when tried by a jury, the privilege, as in England, of challenging a certain number of his jurors without assigning a cause.

The juries in Scotland consist of fifteen, and a bare majority of voices acquits or condemns the prisoner. The minority have also the privilege of recording their reasons of dissent. Since the prisoner is denied the privilege of challenge to his array, without investigating the reason why a *unanimity* in the *verdict* has been established in England, or altering the principle

nal procedure in Scotland, will remember, to what a degree of oppression the doctrine, "that juries were only "to enquire into the *facts* libelled, and that the *court* "were in all cases to determine to what *degree* of criminal "turpitude those facts might amount," was carried in that country some years after the *Restoration*,

ciple upon which the contrary practice has been adopted in Scotland, might it not be proper in all cases, in order to correct the danger which in a narrow country may arise from that *near* majority, to require a greater concurrence---suppose two-thirds of the jury, as is the practice in courts-martial, to infer *capital* punishment. At the same time a smaller majority finding guilty, might still subject to a *more* restricted penalty, or *acquit*, as at present: and indeed the criminal statute book of Scotland requires almost a universal revisal.* Many laws still remain in force, the severity of whose penalties disgrace her statute book, although prosecutions on them have fortunately for some time past fallen into disuse.

By the laws of the republic of Iceland, which exhibit an epitome of the originally free

* The Court of Justiciary delivered, the 19th March, 1783, a solemn opinion, that in Scotland, in *criminal* actions before *inferior* courts, in cases short of *capital* punishments, trial by *jury* is not requisite. "Yet in all trials whatever before the Court of Justiciary, (the supreme criminal court in Scotland) *juries* are requisite." See *Arnot's Crim. Trials.*

free genius of the European governments, and which are ſoon to be publiſhed in Engliſh by the very learned profeſſor Thorkelyn of Copenhagen, the number of jurymen varied with the nature and magnitude of the crime. And the perſon accuſed had it in his power to object to, and ſet aſide, not a certain number only, but even the whole of the jury propoſed, and to demand another.

The number of perſons of which juries by the feudal ſyſtem were compoſed, was at firſt undetermined and irregular in all countries where that form of trial had been eſtabliſhed, ſometimes more, ſometimes fewer, but at length came, in each kingdom, to conſiſt of a fixed number. "And from "accidental circumſtances of little impor- "tance, a different number has been eſta- "bliſhed in different countries; as that of "twelve in England, and as has been above "obſerved, of fifteen in Scotland."*

In

* It is uncertain whether that number *fifteen* aroſe from the ſame number of judges in the Court of Seſſion, or whether

In the parliament of Scotland, the peers and commiſſioners of ſhires were held as one eſtate; and their votes in that aſſembly were collectively called. Theſe, with the landed barons who elected, and were eligible to parliament, were held *pares curiæ* to each other, and ſat mutually as jurymen on each other's trial.*

U The

whether the members of that court were appointed to be *fifteen*, in imitation of the *jury*. Of old, juries in Scotland conſiſted of the number twelve. See Leges Burgorum.

* The gentlemen of landed property, or the leſſer barons, in writings, formerly ſubſcribed by the titles of their eſtates, and not by their names. In the trial of the Earl of Gowrie, and Robert Logan of Reſtalrig, the letters from Mr. Logan, produced in trial, are ſigned *Reſtalrig*.

That gentleman furniſhes a ſtrong inſtance of the ſtate of thoſe times. He had been concerned with Lord Gowrie in that unaccountable conſpiracy againſt the life of King James VI. but had not been ſuſpected; and he had been dead two years before the ſhare he had in that affair appeared, and his ſon in peaceable poſſeſſion of the eſtate. Yet, after that period, and in 1609, a ſummons of treaſon was raiſed againſt his ſon, to appear before the king and parliament, and to defend himſelf from the charge of high treaſon exhibited againſt his father.

In

The eldeſt ſons of peers alſo ſat as jurymen on the trials of both, and certainly for the ſame reaſon, namely, that they were held *pares curiæ*.

In Mr. Arnott's Account of Criminal Trials in Scotland, and in Mr. Wallace's Treatiſe on the Peerage of that Country, ſeveral liſts of juries are given, from which it appears, that, in 1537, on the trial of John, Maſter of Forbes, at the inſtance of the Earl of Huntlie, for conſpiring the life of King James V. the jury conſiſted of Robert Lord Maxwell, (Maſter of Nithſdale) William, Maſter of Glencairn, and thirteen gentlemen.

In

In the abſurdity of law form, his father's bones were dug out of the grave, and produced in court to receive ſentence. He was pronounced a traitor; his eſtate was forfeited to the crown, and his ſon and family involved in ruin and diſgrace. *Account of Criminal Trials, by Mr. Arnott.* The above privilege of *ſubſcription* was taken away by 1672, c. 21.

In 1586, Archibald Douglas, couſin to the Earl of Morton, was tried as acceſſary to the murder of Lord Darnley, before a jury, of which Patrick, Maſter of Gray, was chancellor or foreman. Several perſons were ſummoned to attend that jury, who abſented themſelves, and were fined each in fourteen pounds, among whom was Robert, Lord Seton, who was afterwards, in 1600, created Earl of Winton.

In 1609, the jury which ſat on Lord Balmerino's trial conſiſted of nine lords of parliament, William, Maſter of Tullibardin, and five gentlemen. That before whom Patrick Stewart, Earl of Orkney, was tried in 1614, conſiſted of ten lords of parliament, William Lord Kilmaurs, (Maſter of Glencairn) with four gentlemen. And that before which John, Maſter of Tarbat, Enſign Andrew Mowat, and James Sinclair, writer in Edinburgh, were

tried for the murder of Elias Poiret, Sieur de la Roche, in 1691, conſiſted of the Lord Bargennie, a peer of parliament, and fourteen gentlemen; of which jury Sir William Ker of Greenhead, was appointed Chancellor.

As no opportunity has occurred of examining the records of criminal trials in Scotland, it is uncertain whether there be an inſtance or no of a peer's eldeſt ſon having ſat ſince 1587, on the trial of a commoner, other than the ſon of a peer. They had ſo ſat the preceding year; and from the liſts above given, it ſeems clear that they were not diſqualified, or declared incapable of exerciſing that privilege. They ſat in 1609, and 1614, on the trials of peers; and, in 1691, a peer of parliament ſat on the trial of the Maſter of Tarbat and two other gentlemen, without even being chancellor of the jury. Gentlemen commoners alſo ſat on all thoſe trials.

trials. It was as *pares curiæ* that theſe were entitled to ſit on thoſe juries; and, *vice verſa*, the eldeſt ſons of peers, and even peers of parliament did ſit, and were entitled to have ſitten on the trials of commoners. It is not therefore, that they are diſqualified or incapacitated, it can be only *propter honoris reſpectum*, and in concurrence with the practice in England, that they have not been called upon ſince the Union to ſerve on juries.

It may perhaps be objected, " That in " Scotland there was a court for the " trial of peers, diſtinct from the jury, who " were to be fifteen; that the majority " were to determine the verdict, the fact " only being referred to the jury on aſ- " ſize. That the law is judged by the " court; and that if the majority of the " jurymen were peers, the reſt might " have been gentlemen." But whatever weight

weight there may be in theſe objections, in certain caſes, they cannot poſſibly hold good with reſpect to the jury before whom the Maſter of Forbes was tried in 1586: or in that before whom the Maſter of Tarbat and the other gentlemen were tried in 1691. The majority on theſe juries were neither peers, nor ſons of peers. Now, either their eldeſt ſons are to be tried as *peers*, or they muſt be, in *law*, *pares curiæ* to their *inqueſt*.

No. IV. p. 42.

AT the time when this act was paſſed, namely, in 1681, none claimed the privilege of voting, but thoſe who were in poſſeſſion of both the *ſuperiority* and the *property* of their eſtates. But the abolition of the *heritable* juriſdictions having diminiſhed the weight of the great proprietors, whether peers or commoners, ſuch of them as were poſſeſſed of great eſtates, and extenſive ſuperiorities, inſtructed by the diſcriminating and inventive genius of lawyers, applied themſelves to the recovery and extenſion of their influence in another manner. This they have been enabled, in a great meaſure, to effect, by the circumſtance, that a public right to the bare *ſuperiority* of land, is ſufficient to entitle the holder either to elect or to be elected to parliament:

parliament: nay, even though that public right be no more than a right of *life-rent*, or of *wadſet*, which laſt is a ſpecies of mortgage, defeaſible often at pleaſure, or within a few years, by the payment of the debt, on the part of the granter of the wadſet. This debt is generally *nominal*, or, at moſt, a very trifling ſum given, for the ſole purpoſe of creating a freehold qualification. Theſe freeholds ſeldom yield more than a few ſhillings per annum, while an eſtate of as many thouſands of pounds, if not held *directly* of the crown, cannot entitle the proprietor to a ſingle vote; the parliamentary *patronage* of theſe eſtates being poſſeſſed by the *ſuperior*. A forty ſhilling freehold, of old extent, when poſſeſſed in property, is an eſtate of leſs annual value than a freehold of four hundred pounds valued rent, when alſo poſſeſſed in property. But, as the act of the 16th of George II. c. 11, has provided, that theſe freeholds ſhall not now be valid,

lid, unleſs they have been regiſtered in the record of retours, previouſly to the year 1681, ſuch freeholds are not, at this day, very frequent.* And when they are held in bare ſuperiority only, the value of both kinds of *freehold* is equally nominal.

It may perhaps be queſtioned how far the acts of 1661, c. 35, and 1681, c. 21, were intended to remove the *bar* of *actual reſidence* within the ſhire, as provided by

* Scotland appears to poſſeſs a decided ſuperiority over England, in her general and *accurate* record of all *rights* to landed property, and *mortgages* affecting it. If on the one hand, this record may tend at a time to prevent an exertion of *credit*, it will on the other afford a juſt ſituation and proper ſecurity to the *creditor*. *Private vices* are not always *public benefits*. A ſimilar record has been ſome time eſtabliſhed in England, in the county of Middleſex, and in two of the *Ridings* of Yorkſhire only. It does not appear that it has tended to diminiſh the exertions of induſtry, nor to check great commercial ſpeculations in theſe counties; and yet objections and prejudices are entertained againſt *inſtituting* a *general* record over the kingdom.

1587, c. 114; neither of theſe acts of parliament repealed that proviſion; but it ſeems to have fallen into diſuſe, and was omitted in theſe acts, and in that of 16 Geo. II. &c.

The evil of theſe fictitious freeholders, exceſſively multiplied, has now riſen to the height: and a general opinion prevails in Scotland, that they ought to be aboliſhed. But, while ſome declare themſelves only for the *abolition* of life-rent and wadſet votes, others are alſo deſirous of obtaining an increaſe of voters, by *reducing* the extent of valued rent requiſite to form a qualification, though ſtill retaining the reſtriction of holding that valued rent directly, and *in capite*, of the crown; with this alteration, that the voter ſhall be in poſſeſſion, *bona fide*, of both the *ſuperiority and property* of that eſtate upon which he ſhall claim to vote, and that the vaſſal

ſhall

ſhall be entitled to *purchaſe* the ſuperiority of his eſtate from his ſuperior, and ſo be enabled to become a crown vaſſal or tenant *in capite*.*

 Although

* By this propoſal, which will attach to any *qualification quantum* whatever, *that hardſhip* which ſuperiors, within the ſhire of Sutherland, were ſubjected to by 16 Geo. II. c. 11, § 20, in being deprived of a recompence and *value* for their ſuperiorities, will be avoided; and *vaſſals* will be enabled, without an improper condition, to enjoy the privileges of *electors*. On this ſubject the following propoſals are ſubmitted to conſideration.

I. That where the ſuperior and vaſſal do not agree on the *price* to be paid for the purchaſe of the ſuperiority, the *vaſſal* ſhall be entitled to apply to the *ſheriff* of the county within which the ſuperiority is ſituated, *who* ſhall, on proper *intimation* to the parties, appoint a *jury* to fix and determine the purchaſe price, upon which, and proper *conſignation* of the price, the vaſſal ſhall be entitled to demand *inveſtiture* of the ſuperiority.

II. That where the ſaid ſuperiority is *entailed*, the *price* ſhall be veſted in truſtees to be named by the ſheriff, for *behoof* of the heirs of entail.

This has already been appointed by 20 Geo. II. c. 50, when the ſuperior choſe to diſpoſe of *entailed* ſuperiority to his vaſſals.

III. That

Although it may not, from peculiar circumſtances, be at preſent proper to extend,

III. That the vaſſal ſhall be entitled to compell a purchaſe of the *bare* right of ſuperiority *only*; and the ſuperior to be ſtill entitled to retain and levy the *feu-duties* and *caſualties* iſſuable from the eſtate.

IV. That when the vaſſal ſhall compel the ſale of his ſuperiority, or a *part* thereof only, the ſuperior may inſiſt on his purchaſing the *whole* of his ſuperiority within that county, *held* by him of that ſuperior.

V. That this right in the vaſſal to purchaſe ſhall not extend to lands already feued, or to be feued of, for the *erection* of buildings within villages and towns, not *burghs* royal. It ſeems proper, from various reaſons, that the ſuperior ſhould remain the *crown vaſſal* in ſuch towns and villages; and were thoſe *properties* held *directly* of the crown, the expence of compleating *crown rights* is ſuch, as would extend far upon their ſmall value.*

Perhaps, where the ſuperior levies, *bona fide*, as *feu-duty*, a certain proportion (ſay one *third* part) of the real *annual* value of the eſtate, the right of purchaſe in the vaſſal, to the *bare* right of ſuperiority even, might in all caſes ceaſe.

* 1. It would tend conſiderably to the improvement of theſe towns and villages, and to the ſecurity of property within them, were ſheriffs entitled to determine, under *appeal* to the Court of Seſſion, in queſtions of *declarators* of

tend, in Scotland, the privilege of voting ſo far as in the ſiſter kingdom; might it not,

of property within their county, under a certain *fixed* value. Theſe properties are often of very ſmall value, and *litigation* in the ſupreme civil court is very expenſive. Many ſmall proprietors all over Scotland, beſides thoſe of towns and villages, "Whoſe harveſts are but half a ſheaf," would alſo be benefited in the *ſecurity* of their property by this propoſed alteration.

2. Theſe towns would alſo be improved, was a power ſimilar to what is poſſeſſed, in virtue of 1663, c. 16, by the magiſtrates of burghs royal, given to their magiſtrates, by which they might be entitled to apply to the ſheriff of the county, who, on proper notification and delay, as preſcribed in that act, ſhould *order* public ſale of *ruinous* feued properties ſo complained of within them, and *conſignation* of the price for *behoof* of the heirs, after paying all arrears and expences; and that the ſheriff ſhould *authenticate* the purchaſe.

Nothing can tend in a greater degree to prevent *new ſettlers*, or to diſcourage the inhabitants, than the *want* of induſtry, which the appearance of theſe *ruinous* buildings exhibit in theſe towns and villages. The ſheriffs in Scotland are judges appointed by the *crown*, for life: 1747, c. 43.

3. In burghs royal, the *town-clerk* gives, under a moderate *fee*, *ſaſin* (poſſeſſion) of property ſituated within the borough, and keeps a record of *ſeiſins*, wherein they are inſerted at *one-half* the expence of other regiſters: 1681, c. 11. In theſe other towns and villages a *notary publick* is required, nor can the *ſeiſins* be recorded but at

double

not, however, tend to excite and diffuſe a more general and lively ſpirit of induſtry and improvement, than has hitherto prevailed in that kingdom, to admit a greater number of proprietors to the rights of election? And would not this produce a more general concern for the public welfare? If ſuch an increaſe of voters as is propoſed, ſhould ever take place, might not the rights of parliamentary election and repreſentation be extended to the qualification neceſſary to the commiſſioners of ſupply? who, by law, muſt be poſſeſſed of one hundred pounds Scotch of valued

double the expence of thoſe in burghs royal. Why ſubject their inhabitants to theſe inconveniencies? Let a *record* be kept for the purpoſe, in the ſheriff-court of the county, upon *equal* terms with thoſe of burghs royal; and let their *town-clerks* be entitled to *authenticate* and *atteſt* all *deeds* within theſe towns and villages. The *precept* to the *town-clerk* in burghs royal, iſſues from the *provoſt* or chief magiſtrate; in theſe towns and villages it would iſſue from the *ſuperior*. And had theſe towns no *town-clerks* at the time, a *notary publick*, as at preſent, would ſtill be entitled to give *poſſeſſion*.

valued rent, a ſum, which joined to the real property, will, on an average, raiſe an eſtate of fifty pounds ſterling per annum.*

It may be alſo proper to conſider, whether the powers now veſted by act of parliament in the commiſſioners of ſupply in Scotland, namely, that of ſplitting valued rents, the preliminary ſtep in creating parliamentary freeholds, and of proportioning the

* According to the preſent conſtitution of the law, as many perſons may be appointed commiſſioners of ſupply upon the ſame parcel of ground, as there are ſub-infeudations of that property: but the objection to what is propoſed, ariſing from this circumſtance, would be removed by the propoſal which has been offered to the conſideration of the public, for making it neceſſary that voters ſhall be inveſted with both the ſuperiority and the property of their eſtates. It would alſo be an improvement, were the ſame united qualification made neceſſary to *acting* commiſſioners of ſupply. Erſkine's Inſtit. p. 65, 8, 31.

the ſtatutory aſſeſſments on the counties, do not entitle that claſs of men to be included in any extenſion of the right of voting which may be deemed neceſſary in that country? The reaſon of requiring any qualification with regard to property in voters is, to exclude ſuch perſons as are in ſo mean a ſituation that they cannot be ſuppoſed to have any *free will* of their own. But, ſurely thoſe who are poſſeſſed of the real property that uſually accompanies 100l. Scotch of valued rent, are not included in that predicament. It is farther to be conſidered, whether ſuch an extenſion of the right of voting as has been above recommended, would increaſe the number of freeholders within the ſhires, ſo much as to warrant the adoption of an *intermediate* qualification which has been propoſed between *that*, and the preſent 400l. and whether there might be reaſon

ſon to apprehend, that more confuſion would ariſe from the increaſe of voters, in conſequence of the extenſion above propoſed, at the meetings of election, than what may now happen at thoſe meetings at which all the commiſſioners of ſupply are entitled to attend?

The county elections in Scotland are determined at one ſitting, and without continuation of a *poll.* It does not appear that the extenſion under contemplation would increaſe the number of voters ſo much as to occaſion any ſuch alteration in the forms of election: and, if it did, it would remain to be conſidered how far, and by what ſacrifices that alteration was to be avoided.

It has been already obſerved (ſee page 65) that no redreſs took place in conſe-

quence of the *complaint* made by the burgeſſes at the Revolution. One act of parliament was indeed immediately paſſed, 1689, c. 22, by which a *poll election* of magiſtrates was ordered, excluding from the right of voting, honorary burgeſſes and beidmen, that is, penſioners of the burgh. But this act of parliament was ſo framed as to ſerve *only* for that one election; and theſe magiſtrates, ſo choſen, in the next year again appointed their ſucceſſors in office.

Several acts of the parliament of Scotland appoint theſe magiſtrates to account for their expenditure of the funds of the burghs, at the ſuit of the burgeſſes; and, it is believed, that the *charters* of the burghs *convey* the ſame obligations; yet theſe acts of parliament are ſaid to have *preſcribed*, the meetings of *head-court* had become

become a mere farce, and their magiſtrates have ſucceſsfully, as yet, reſiſted every attempt in the courts of law in Scotland, to oblige them to render an account of their management of theſe funds.*

* Their only remedy, therefore, now ſeems to be by application to parliament; and it were well, that it was alſo again enacted in the bill which the burgeſſes are *now* allowed to bring in "for Regulating the *Internal* Government of the Royal Burghs in Scotland," that *actually* reſident and real burgeſſes ſhould *alone* be entitled to hold the higher offices of magiſtracy within burghs, *a point which is perfectly diſtinct from that of their parliamentary repreſentation.* This ſhould alſo be enforced by a penalty. The act 1535,* c. 26, which formerly appointed the ſame qualification, and alſo that the magiſtrates ſhould account *annually* in the Exchequer, had been rendered entirely ineffectual from the omiſſion of the *penalty*. And ſuch a regulation indeed appears to be the great prevention of *inattention* to the duties of office, or of *jobbing* in future the *common good* of the community. A ſtranger, or perſon unconnected with the burgh, can deſire to be in the magiſtracy from *intereſted* motives alone.

* By 1609, c. 8, noblemen and gentlemen landed were *again* prohibited from officiating as magiſtrates in burghs royal, *but with equal effect.* p. 48,

No. V.

Extracted from the Minutes of the Parliament of Scotland.

Minute of Parliament, 24th Jan. 1707.

THEN the debate mentioned in the former day's minute was resumed, anent what proportions the barons and burrows shall have of the 45 members that are to sit in the House of Commons of Great Britain. And thereupon a clause was offered to be insert in the act, regulating the manner of electing the representatives of Scotland, in these terms, " And her Majesty with advice

" and

" and conſent aforeſaid, ſtatutes and or-
" dains, that thirty ſhall be the number
" of the barons, and fifteen the number of
" the burrows to repreſent this part of the
" united kingdom in the Houſeof Com-
" mons of Great Britain; and that no
" peer, nor the eldeſt ſon of any peer, can
" be choſen to repreſent either ſhire or
" burgh in this part of the united kingdom,
" in the ſaid Houſe of Commons."

And after debate upon thefirſt part of the ſaid clauſe, the vote was ſtated, " If " the number ſhall be thirty for the ba-" rons, and fifteen for the burrows, yea, or not." Thereafter, the vote was put, and it carried yea.

Minutes 27th January, 1707.

THEN the ſecond part of the overture mentioned in the former day's minutes was

was again read in theſe terms, " And " that no peer, nor the eldeſt ſon of " any peer, can be choſen to repreſent " either ſhire or burgh of this part of the " united kingdom, in the ſaid Houſe of " Commons." And after debate thereon, another clauſe was offered in theſe terms, " Declaring always, that none " ſhall elect nor be elected to repreſent a " ſhire or burgh from this part of the united " kingdom, in the parliament of Great " Britain, except ſuch as are now capable " by the laws of this kingdom, to elect or " be elected as commiſſioners for ſhire or " burgh to the ſaid parliament."

After further reaſoning thereon, the vote was ſtated; " Approve of the firſt " clauſe, or of the ſecond, but before voting, it was agreed, that the votes be " marked, and that a liſt of the members " names, as they vote, be printed and read,

" corded, and the Lord Chancellor was al-
" lowed to have his name printed and re-
" corded amongſt thoſe who voted for the
" ſecond clauſe."

Then the vote was put, " Approve of " the *firſt* or of the *ſecond clauſe*," and it carried *ſecond*.

State of the Vote January 27th, 1707.

SECOND.

Nobility.	*Nobility.*
Lord Chancellor,	Earls Loudon, *Se-*
Earl of Finlater	*cretary*
and Seafield	Crawford
Marquis of Mon-	Errol
troſe, P. S. C.	Mariſchall
Dukes Hamilton	Sutherland
Argyle	Rothes
Marquis Tweedale	Morton
Lothian	Buchan
Earl Mar, *Secretary*	Glencairn

Earls

Nobility.

Earls Eglintoun
Caithneſs
Wigton
Roxburgh
Haddington
Galloway
Lauderdale
Wemyſs
Dalhouſie
Finlater
Leven
Northeſk
Balcarras
Forfar
Kilmarnock
Kintore
Dunmore
Marchmont
Hyndford
Cromarty
Stair

Nobility.

Earls Roſeberry
Glaſgow, *Treaſurer's Deputy*
Hopetoun
Ilay
Viſcount Kilſyth
Lords Forbes
Saltoun
Sempill
Elphinſton
Oliphant
Roſs
Torphichen
Balmerino
Blantyre
Fraſer
Bargeny
Banff
Elibank
Belhaven
Duffus

Lords

Nobility.	*Nobility.*
Lords Rollo	Lord Regiſter, Sir
Colvill	James Murray of
Kinnaird	Philiphaugh, knt.

61

Barons.	*Barons.*
Sir Robert Dickſon	Mungo Graham of
of Inverek	Gorthie
Sir James Foulis of	Alexander Douglas
Colinton	of Sagleſhaw
William Morriſon	
of Preſtongrange	

5

Burrows.	*Burrows.*
John Scrimzeour	Patrick Moncrieff
Lieut. Col. John	Sir Andrew Hume
Erſkine	Sir James Smollet
John Muir	Capt. Daniel Mac-
	leod

Burrows.	*Burrows.*
Sir David Dalrymple	William Alvis
John Clerk	John Urquhart
John Roſs	Daniel Campbell
Sir Alexander Ogilvie	Robert Douglas
	Alexander Maitland
Mr. Patrick Ogilvie	George Dalrymple
George Allardyce	Charles Campbell

20

F I R S T.

Nobility.	*Nobility.*
Viſcount Stormont	Lord Juſtice Clerk, Adam Cockburn of Ormiſton Eſq.

2

Barons.	*Barons.*
Robert Dundas of Arniſton	Sir John Lauder of Fountain-hall

Andrew

Barons.	*Barons.*
Andrew Fletcher, of Saltoun	John Pringle of Hayning
William Niſbit, of Dirleton	William Baillie of Lamington
John Cockburn, yger. of Ormiſton	George Baillie of Jerviſwood
Sir R. Sinclair, of Longformacus	Jo. Sinclair, younger, of Stevenſon
Sir John Swinton of that Ilk	James Hamilton of Aikenhean
Sir Patrick Hume of Renton	Mr. Al. Ferguſon of Iſle
Sir William Ker of Greenhead	W. Stewart of Caſtle-Stewart
Sir Gilbert Elliot of Minto	Mr. Jo. Stewart of Sorbie
Arch. Douglas of Cavers	Francis Montgomery of Giffen
William Bennet of Grubbet	W. Cochran of Kilmarnock

Barons.

Humph. Colquhoun of Luſs.

Robert Stewart of Tillicoultry

Sir John Houſton of that Ilk

Robert Rollo of Powhouſe

Thomas Sharp of Houſton

John Haldane of Glen-Eaſges

Sir Thomas Burnet of Leys

Sir David Ramſay of Balmain

William Seton, younger, of Pittmedden

Alexander Grant, younger, of that Ilk

Barons.

John Forbes of Cullodden

Sir James Campbell of Auchinbreck

James Campbell younger, of Ardkinlaſs

Sir William Anſtruther of that Ilk

Thomas Hope of Rankeillor

James Halyburton of Pitcur

Alexander Abercromby of Glaſſaugh

William Maxwell of Cardineſs

Alexander Mackie of Palgoon

James

Barons.	*Barons.*
James Sinclair of Stempſter	Alexander Abercrombie of Tillieboddie
James Dunbar, yger. of Hempriggs	George Mackenzie of Inch Coulter
Sir Henry Innes, yger. of that Ilk	John Bruce of Kinroſs

47

Burrows.	*Burrows.*
Sir Patrick Johnſton	John Hutchinſon
Robert Inglis	Archibald Shiells
Walter Stewart	John Lyon
Hugh Montgomery	Mr. Dougal Stewart
Alexander Edgar	George Brodie
James Scot	Sir D. Cunningham
Sir John Anſtruther	Jo. Carruthers
Sir John Erſkine	George Home
James Spittle	Mr. Rorie Mackenzie
William Coltram	
Sir Peter Halket	Mr. Robert Fraſer
William Carmichael	

23

FIRST.		SECOND.	
Nobility -	2	Nobility -	61
Barons -	47	Barons -	5
Burrows -	23	Burrows -	20
	72		86

Majority 14

N. B. In the propoſal, (ſee page 163) that *vaſſals* ſhould be entitled to *purchaſe* the ſuperiority of their lands, their *right* of purchaſe ſhould be competent againſt every *intermediate* ſuperior, that may be *interjected* between the vaſſal and the crown, or prince. And whatever advantage, in the right of voting, may be granted to property, ſhould *equally* extend to what may be *entailed*.

F I N I S.

ERRATA.

ERRATA.

1. Page 8, line 1ſt, read, *many* of the innovations, &c.
2. Page 12th, line 14th, after kingdom, add *(joined to the ſpirit of Clanſhip)* were diſplayed, &c.
3. Page 17th, *note*, add, See 1661, c. 1.
4. Page 29th, *note* line 5th. for *any* alteration, read *any ſuch* alteration.
5. Page 48th, line 14th, read *may have* left, &c.
6. Page 96, *note* line firſt, for, in *that* meaſure, read, in *this* meaſure.
7. Page 125, line 4th, for *whatever*, read, *the greateſt*.
8. Page 135, the eldeſt ſons of peers were called *maſter in Scotland*, as the maſter of Glencairn, &c.
9. Page 182, *ad finem*, for No. read *N. B.*

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